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# **Children in Between: Child Rights and Child Placement in Sri Lanka**

**By**

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of Philosophy in Law

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## **Declaration.**

This thesis is entirely my own work. It has not been submitted for a degree at any other university.

Chapter 5 contains one reference to a research report written by me in 1994, and published by the Swedish International Development Agency. No further reference is made to that or any other previously used material, nor is any previously used material included in this thesis.

## **Abstract.**

This thesis examines the appropriateness of the use of rights based strategies in meeting children's needs. In an era of proliferating international conventions this is an issue that demands further debate.

The starting point of the thesis is the way that rights talk about children. It is suggested that ideas of difference are integral to child rights. Needs and rights are attributed on the basis of difference. The difference between children and adults is defined and informed by the scientifically based discourse of child development, on which a prescriptive model of childhood is built. Difference also structures the relationship between child rights and other cultural norms of childhood. Rights make claims to a universal application. Other constructions of childhood are redefined as local, and required to fit into the rights framework, or delegitimised.

Developing these points it is asked whether rights, as an internationally dominant discourse, can succeed in accommodating rather than excluding difference, since the process of exclusion involves an operation of power which serves to reinforce the status quo. This is a problem that is recognised in some theoretical perspectives (although only rarely applied to child rights). The response is usually in terms of restating universal claims, or advocating some form of cultural relativism. This thesis leans in favour of the latter. However, it also departs somewhat from this dichotomy, and argues, relying on ideas of chaos and complexity, that child rights need to be reworked. Two distinct approaches are suggested: either the recognition of radical, incommensurable difference, in which there can at best be convergence under a limited overarching framework of values; or the removal of difference as a structuring concept.

The argument is elaborated through a detailed analysis, structured by theories of globalisation, of the interaction between the dominant rights discourse of childhood, and alternative conceptions of childhood in Sri Lanka. The analysis is based on field research, in which the response of the child care authorities to the practice of child placement was investigated, as was the impact on children and families of their responses. This investigation involved one of the only pieces of empirical research yet done in Sri Lanka, on either the juvenile courts, or on child placement and domestic service. The findings supported the conclusion that in order to be able to embrace complexity, and empower children, child rights need to be rethought.

## **Chapter One.**

### **Introduction.**

Child rights get everywhere. They form the basis of indicators of national progress, the subject of media debate, and the centrepiece of international legal standards. Driven by the United Nations Convention on the Rights of the Child (the CRC), policies to promote child rights are devised across the globe. In some quarters, the most vocal and dominant, such ubiquity is seen as, at worst, a qualified good. Problems are perceived by others, but child rights are persevered with as the “language of priority in modern society.” (Campbell 1994: 263) or, as Baxi puts it in discussing the rights discourse as a whole, “human rights languages are all we have” with which to challenge power (1998: 127). This is a thesis about rights, power and priorities. What are the priorities of child rights? Are children empowered by them? I attempt to examine these questions in connection with a specific group of children: child domestic servants in Sri Lanka.

Child domestic service is treated in international discourse as one of the most abusive forms of child work. Child domestic servants work very long hours, and are vulnerable to physical, psychological and sexual abuse. The practice of placing children in “affluent” households has been equated with slavery. Indeed,

girls who are domestic servants “may well be the most exploited children of all” (ILO and UNICEF 1997a; ILO and UNICEF 1997b; Innocenti Digest No 5 1999). The language of rights is prominent in the discussion of child domestic service. Rights are used to define the problem. Along with other forms of child labour, child domestic service is in violation of human rights (ILO 1998a and ILO 1998b). It robs children of their fundamental rights, including the right to education. The practice is so comprehensively abusive that it is clearly contrary to the right of the child to be protected from economic exploitation and hazardous work under Article 32 of the CRC (ILO and UNICEF 1997a and 1997b; Save the Children Fund 1999: 65). Rights are also a solution. Legislative action should be taken to protect these children (ILO and UNICEF 1997a and 1997b; ILO 1998b).

In Sri Lanka, official statements present child domestic service as one of the major child labour problems in the country (ILO Colombo and Ministry of Labour and Vocational Training, National Workshop September 1996). As at an international level, a strong connection is made between child domestic service and child abuse (Sri Lankan Government Hansard 1995a and b; ILO Colombo and Ministry of Labour 1996). Again legislation is recommended to safeguard these children’s rights (Technical Committee Report nd).

The priority given to the concept of rights explains why child domestic service should be represented in this way. What it does not do, however, is address the

effects of applying rights to children in these circumstances, nor indeed, does it explain why rights are a “language of priority.” It is my intention to consider precisely these issues in the following pages, but before I begin I feel obliged to forestall a potential criticism from rights proponents, that I am simply indulging in an academic exercise, with little relevance to the “real” world. Baxi, for instance, expresses his frustration with the intellectual meanderings of post modernists and relativists, which undermine the praxis of human rights, and fail to address the reality of human suffering (1998). I am, I hope, offering an academic analysis, that is after all a requirement of the discourse in which I am writing, but it is one driven by real concerns. As a lawyer who has experienced the operation of child rights at first hand, I want to ask if rights are the best we have, are they good enough? In my view post modern critiques, which, developing the ideas of Derrida and Foucault (for example), challenge the monolithic certainties of western thought, are crucial in considering this question, as Baxi himself accepts. I make no apologies then for beginning my analysis with a post modernist discussion of some of the characteristics of the rights discourse.

### **Rights Dynamics.**

The representation of child servants above illustrates the way that rights are used to address the situation of disadvantaged children, or children in “exceptionally difficult circumstances” to borrow the language of the CRC. The use of the rights

discourse in this way is complicated by the ongoing debate about the nature of child rights. An important tenet of the discourse is that to be a rights holder, one has to have the capacity to exercise those rights. Many theorists (and activists) would argue that children do not have the necessary capacity. Instead they are treated as irrational, or at best, progressively rational (Freeman 1992) or potential adults (Campbell 1992). In short, as O'Neill (1992) suggests, the main remedy for children is not rights, but to grow up. The problem of attribution must be a consideration in any discussion of the effectiveness of child rights, and I will look at it in the next chapter. However I also want to consider the conceptualisation of children which underlies this problem. In debating the nature of child rights, children tend to be lumped together as a homogenous group, circumscribed by age, or age ranges, depending on the theorist involved. Further, children as a group are contrasted with adults: rational/ irrational, mature/ immature; with the adult characteristic providing the norm. In effect, children are defined as not adult, as different, with the corollary that the nature of their rights is called into question. I would not for a minute deny that children have distinctive if not uniform characteristics. What I am concerned with here, though, is how these characteristics are understood, and the implications of this understanding. Following the deconstructive lead taken by James, Prout, Rose and others, I will suggest that the definition of children as different is crucial to the way that they are understood in the child rights discourse. Indeed the idea of difference is a central theme of this thesis, difference as a strategy of meaning in western post



enlightenment thought.

Ideas of difference can be found at work in the rights discourse as a whole, not simply in relation to child rights. This can be demonstrated by reference to a piece by Donnelly, who, I would suggest, is a fairly typical representative of the mainstream of rights theorists. In an “analytic critique of non western conceptions of human rights” (1982) Donnelly discusses human rights ideas in various cultural traditions, and concludes that none have a suitable equivalent to the western concept of rights. Non western concepts place too much emphasis on duty rather than rights, and (here he reveals his cold war antecedents) community, “peoples”, rights are allowed to trump those of the individual. Such is the contradiction between these positions that “it would appear as if human rights could be combined with peoples’ rights in any substantial way only with great risk to their essential character”.

In Donnelly’s view it is uncompromised western human rights that are best placed to meet the needs of both western and Third World (sic) countries, because the “concerns and needs in the area of human rights and human dignity are, for objective historical reasons, essentially the same today in the Third World as they were two or three centuries ago in England and France.” Modernisation is, in fact, placing non western societies in the same position as the more developed west. It is this process which provides a justification for the propagation of the rights

discourse on an international basis, because rights have become as relevant in Africa as they are in Europe. But Donnelly does not require a justification for his view that human rights should be propagated internationally, they justify themselves.

“...if we take seriously the idea of human rights, we must recognise them as both a historical product and of universal validity.... In fact, the idea of human rights would even seem to demand of us a concern for their realisation universally... [as for] any moral claim, which we know arises out of values that are genetically contingent but which, by their very nature must be taken to apply universally or nearly universally.”

In other words human rights are already universal because they are human rights.

What Donnelly is doing here is interesting. First of all he engages in a process of definition. It is not simply that he provides a definition of human rights as “entitlements”. He lumps together different cultural values into one apparently homogenous “non western” group, and treats them as dealing with human dignity. Significantly he also contrasts the two sets of ideas, arguing that human rights are in fact more effective in promoting human dignity. Non western ideas having been identified are excluded as irrelevant. There is no room in Donnelly’s account for

cultural relativism. Instead, as Fitzpatrick (nd) argues, it is a form of cultural absolutism that is “the necessary supplement” which gives meaning to human rights claims such as those of Donnelly. Non western societies are, paradoxically, treated as being in the grip of absolutism, via the “wistful social vision” of some commentators (Donnelly; Fitzpatrick). Their values are de-valued, and other legal sensibilities (Geertz 1983) reduced to the status of tradition (Donnelly; Fitzpatrick). In contrast western values are established as the prevalent norm. This tendency towards exclusion of “non western” ideas and the associated promotion of western norms is an important dynamic of the rights discourse (child and human) and instances of exclusion and promotion punctuate this thesis.

Another dynamic in Donnelly’s analysis is the relation between universalism and particularism, a dichotomy that may also be considered as typical of western thought. Particularism in this instance is understood as a (primitive?) tendency to refer to values integral to a society. Universalism, in contrast, is the application of general principles, perhaps derived from human qualities, to social behaviour. In his analysis Donnelly identifies the disappearance of particularism. Non western, traditional societies are changing, he says, they are becoming modernised. They are, by implication, becoming more like us. On the other hand, the values of one form of particularism are reinforced by Donnelly. In suggesting that human rights are not only more relevant, but are also universal in any event, he transposes concepts which have a specific origin, content and application, turning them into

general principles which transcend cultural boundaries. Human (and child) rights, as Fitzpatrick suggests, apparently “escape the trammels of culture altogether” (nd: 307).

Derrida’s analysis challenges the idea that rights are universal. He argues that the human rights discourse is limited by abuses such as apartheid. While this (or any other) negation of rights exists “...the customary discourse on man, humanism and human rights has encountered its effective and as yet unthought limit, the limit of the whole system in which it acquires meaning.” (1986a: 337). The point here is not simply the obvious one that human rights do not have universal effect while abuses exist; rather that the discourse itself incorporates a limit, operating as it does within a system of thought that has produced both rights and racism.

Fitzpatrick makes a related point: the assertion of human rights depends on them not being observed. Rights need racism, the one is constituted by the other.

Derrida’s work also points to another limit to the rights discourse. Rights lay claim to an essential form of humanity which has a universal applicability. In Donnelly’s case essential humanity is represented by genetic factors (see above). Derrida argues that there is no essential human nature on which to base the rights of man (or children), there is, in effect, no essence, or none that can be conceptualised. In his terms, Donnelly is conflating genetic factors with cultural values. Rights belong to a particular system of ideas, they are limited because they are a cultural product.

Derrida's (and Fitzpatrick's) argument that rights are a cultural product has shaped my analysis. It translates into a demand that I situate myself within the western culture that produced human and child rights. My analysis will be constrained by that culture, as is that of Derrida. When confronted with apartheid, Derrida reached for essentials, for a law beyond law with which to condemn the system (1986: 337). Nonetheless it remains important to be aware of the "phantasms" of western thought, even if one cannot escape them, a point which another reference to Donnelly suggests. In failing to treat rights as a purely cultural product Donnelly fails to address the operation of power in his, and other commentators, analysis.

Baxi does not make this mistake, but he is critical of the absence of essentials in post modern analysis, precisely because it is an absence which robs rights of a platform, a set of universal norms, through which to address power, as Derrida found. To my mind this is the nub of the problem: how do rights address power and how does power relate to rights? And power is what it is about, as Foucault recognised, "When I think back now, I ask myself what else it was that I was talking about...but power?" (1979:135).

### **Foucault and Ideas of Power.**

The rights discourse deals in power. Donnelly, for example, argues that the individual needs rights to protect him (sic) from society which "in the form of the

modern state, the modern economy, and the modern city, [appears] as an alien power”. Rights are intended to restrict the power of dominant groups, and balance the interests of the individual against those of the state. Power, though, is left untheorised (admittedly a discussion of power is not the focus of Donnelly’s piece). However an understanding of the way power works is important if rights are proposed as an effective response. Many child rights theorists also argue that rights empower. Roche, writing in and about the United Kingdom, is one of them. He argues that rights are a political language, a language that can change constructions of children and allow their stories to be heard. Power here is understood in terms of the power of social constructions to shape expectations and experience. In his concluding paragraphs Roche cites Patricia Williams, “For the historically disempowered...rights imply a respect...*that elevates one’s status from human body to social being*” (1995: 296; emphasis added by Roche). Power operates *through* the rights discourse rather than being activated by rights, as Donnelly implies. It is a recognisably Foucauldian approach to power, an approach that I now want to discuss in a little detail.

In considering power, Foucault’s approach is to ask not what is power, but how power is exercised. “To put it bluntly, I would say that to begin the analysis with a ‘how’ is to suggest that power as such does not exist. At the very least it is to ask oneself what contents one has in mind...” (1982: 217). How does power operate then, if it does not exist “as such”? Foucault’s basic proposition is this: individuals

exist subsumed in a series of relations. They may be relations of capacity, of communication and of power. Power in this proposition is a relationship, not a separate entity. Power only exists when exercised between individuals and social groups.

Power is not, Foucault would suggest, a possession of, or a delegation to, particular social groups or institutions, for instance Donnelly's modern state, economy and city. That is, it is not a unidirectional force, emanating from a cohesive coalition within society and imposed on other social groups (1990: 92). As a relationship, or network of relations, power operates at and between all levels and individuals in society. Further, Foucault argues that the operation of power is neither an act of consensus nor the effect of violence, but a mode of action which serves to "structure the possible field of action of others" (1982: 221), an understanding of power reflected in Roche's analysis. Foucault suggests that during the last two centuries power has increasingly been exercised in a particular way, a development of a technique originating in the Christian (Catholic) church, and which he designates "pastoral power" (1982: 213), a power which increasingly orientates itself around the state. Even if one does not accept the origin of this technique, Foucault's characterisation of its operation is persuasive. He suggests that this type of power is focussed both on the individual and on the community and relies on knowing the individual inside and out. Specifically, in this secular era, as the object and subject of medical and psychiatric knowledge. This approach can be

seen in the relation of medicine and psychiatry to children, in the capacity of both disciplines to plot the child's expected development and intellectual skills.

The outcome of this technique of power is, according to Foucault, the subjection of the individual, that is, every individual is categorised and identified - man, woman, child, daughter, worker et cetera - and by that process is defined and understood.

To be a child becomes being certain things, having certain needs, and being distinct from other social groups. This being a child is understood in this way not only by social actors who are not children, but also by children themselves. To be a child is to be an object of knowledge, but also to internalise that knowledge. Power is therefore experienced not merely as a negative force, but also a positive production of the individual.

Foucault's analysis of power is significant for the discussion of child rights for several reasons. It looks beyond dominant social groups to the immanent networks and effects of power. It is not a discussion at the level of "class interests" or economic relations, but one which addresses the heart of the experience of being, of being a child. Equally it permits a discussion of how power operates, how knowledge and power combine to produce specific and powerful constructions of children. Difference, the difference between children and adults for example, becomes an effect of power.



This analysis of power, although reflected in Roche's piece, also calls into question his basic claim that rights challenge constructions of children. This is to distinguish rights from the social discourses which construct children. As I will argue in the next chapter, far from being distinctive in this way, rights are complicit in constructing the identities of children.

In effect I will treat law as a discourse of power. Foucault distinguished between the law and scientific discourses as modes of power. He argued that the law's influence was reduced in the context of the deployment of pastoral power. As mentioned above this form of power relies on medical and "psy" discourses, discourses through which the individual can be constructed and regulated. In Foucault's analysis power has been increasingly exercised through such regulative "disciplinary" modes of power rather than the repressive techniques represented by law. "Our historical gradient carries us further and further away from a reign of law..." (1990: 89).

Legal theorists, such as Smart and Fitzpatrick (see also Santos 1995:3), have debated the consequences of this analysis for law. Both would agree that the potential exists for law to be displaced, but both also argue that law continues to be a significant mode of power. Fitzpatrick, for instance, argues that law provides a "necessary supplement" for disciplinary techniques, for instance by masking their operation in the legally constituted "private" sphere of personal relations (1992:

149, 166). Equally law remains constitutive of social actors, through the promulgation of a legal subjectivity which replicates the controlled self responsible individual of the disciplinary techniques, and is defined in the negative as not black, female, or underage (1992: 128, 136, 140). That is, it is an expression of difference. The constructive effects of this form of subjectivity will be discussed in the next chapter. Of similar significance is Smart's suggestion that law, far from being in retreat, has extended its influence through association with disciplinary techniques (1989: Chapter 1). The proliferation of rights attributed to children, rights based on the scientific analysis of children's needs, would support this suggestion. Indeed what seems to be happening, as Smart suggests and I will consider below, is that law is no longer simply acting as a repressive mode of power. In combination with disciplinary techniques it also acts to construct and regulate social relations. One expression of this mode of power is the tendency of law to exclude alternative perspectives, a tendency already identified above in connection with human rights. It is this approach to law that I will develop when I discuss child rights in Chapter 2.

Not all theorists would agree with this understanding of the effect of law, including some of those who argue in support of the concept of rights. Baxi, for instance, is curiously ambivalent towards the idea of construction. On the one hand he criticises discourse analysis, I think wrongly, for denying reality, including the reality of suffering (1998: 131). On the other hand he accepts that rights do

construct, but that the constructions in operation are more empowering than the “primordial identities” that they replace (1998: 147). This is a crucial proposition that I will consider in the next chapter: how are children constructed by rights?

Another important implication of Foucault’s analysis of power is that the constructs produced are not given or inevitable, but historically and culturally contingent. In order to tease out the contingencies Foucault developed a form of critique that is “genealogical in design and archaeological in its method” (1984: 46). By this he meant (he explained), that he treated instances of discourses that articulate what we think as historical events (as distinct from transcendental ideas), and by exploring the history of these discourses he tried to uncover the alternative ideas and perspectives that had been excluded in their development. I will attempt to use this sort of approach in my examination of child rights in Sri Lanka, in Chapters 3 and 4.

Foucault’s intention in using this form of critique was to locate the potential for points of resistance to the dominant constructs, a potential integral to his idea of power: “Every power relationship implies, at least *in potentia*, a strategy of struggle, in which the two forces are not superimposed, do not lose their specific nature, or do not finally become confused. Each constitutes for the other a kind of permanent limit, a point of possible reversal” (1982: 225).

Ideas of resistance from within law have been influential in conceptualising ways of addressing the operation of power through law (Ghai nd; Merry 1995 (see Chapter 6 below)). Santos uses ideas of resistance and struggle in his analysis (1995). He identifies an emancipatory form of human rights through which to pursue a counterhegemonic politics (1995: 348 et seq.). He argues that the emancipatory nature of human rights will be achieved through a process of “creollization”, that is an accommodation of cultural heterogeneity through cross cultural dialogues, and he gives NGOs a central role in this process. Baxi elaborates a similar vision (1998). His argument relies on the inclusive nature of what he calls “contemporary” human rights (1998: 132 et seq.). He contrasts this form of rights with “modern” human rights, which was (and is?) exclusive in conception and implementation, applicable only to those with will and reason, that is adult western males, and denied everybody else. Contemporary human rights, on the other hand, supports a multiplicity of right claims. No longer the domain of western style states, local communities, NGOs, “NGIs”, everybody, can and do contest rights and struggle to develop a new discourse. Is this free wheeling exuberance identifiable in the child rights discourse? For instance in the child rights discourse in Sri Lanka? More specifically what claims are made and what norms are challenged nationally and internationally with regard to child domestics? These are questions that I will discuss in Chapter 4, but now to complete my introduction I will consider one last concept, globalisation.

## **Globalisation.**

The idea that rights are historically and culturally contingent is of especial significance in an era of “globalisation”. Globalisation is a buzz word of the 1990s that shows no sign of losing its resonance in the immediate aftermath of the millennium. Globalisation is often used as a way of conceptualising current social relations, and predicting future ones. Various accounts exist. One type of account focuses on the technological developments, which, at an apparently exponential rate, serve to bind the world together; developments which Giddens (1991) links to a change in the sense of self and social organisation. Other accounts chart, from positive (liberal) and negative (often neo- Marxist) positions, the advance of the capitalist market system and associated liberal values. In some of these accounts “second” and “third” world countries are identified as interacting with and perhaps growing more like, the “first” world not only in economic terms but also in terms of value systems. Some proponents of child rights, those who treat the promulgation of the CRC as a relatively uncomplicated matter of acceptance and implementation, can be placed in this category (see for example Hammarberg 1990). Stephens (1995), on the other hand, argues that child rights are an important way of protecting children’s interests in the context of globalising capitalism. Her major concern is not simply the new economic challenges that many children face, but the changes in the way that concepts of children and childhood are constructed in this era of “late capitalism”, seeing ideas of children as being “at the cross roads

of divergent cultural projects” (1993: 23). I share her concern (if not her solution) which brings me to a third set of accounts. These look more closely at cultural values and asks how they are affected by the concentration of interaction generated by technological and economic developments. Although these accounts tend to have a teleological quality, they are important for my analysis<sup>1</sup>. They provide a way into exploring how child rights, as a western cultural product, operate in an international context. I have found the work of two theorists particularly helpful, Robertson and Appadurai, who offer contrasting dynamic models of interaction on a global scale.

Robertson defines globalisation as involving “the intensification of consciousness of the world as a whole” (1992: 8) and at the centre of his analysis (and also that of Appadurai) is a concern with the way in which global consciousness is structured. How, Robertson asks, can global actors think about the world? In answer to this question he suggests that, in the current phase of globalisation, global ideas are structured around four organising components or “reference points” identified as: national societies; individuals; the world system of societies; and human kind (1992: 25). Global actors are, he argues, constrained to conceptualise the world in relation to these particular ideas.

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<sup>1</sup>

Whatever the claims made for a global society (claims which imply a qualitative change in social relations) it has not yet arrived, and may never do so.

This description of Robertson's model is derived from the initial summary which he sets out at the start of his analysis, and then goes on to develop in more detail. It should be apparent from the description, that this model of the dimensions of global consciousness involves an idea of *integration* at both epistemological and practical levels (despite his disclaimer 1992: 6). In epistemological terms Robertson is setting out to capture the relationship between "the world and the primary 'objects' which appear to exist in the world"(1992: 25) in a way which recognises complexity and embraces both wholeness and discontinuity. He does this by identifying the basic components of the global field, such as "national societies", and combining this identification with an acceptance that global actors may vary in the way they think about these components at different times and in different ways. At the same time he suggests that, practically, global actors have no option but to think about the world in terms of "national societies", because of the particular historical trajectory that global relations have taken. It is possible, Robertson notes, that alternative forms of globalisation could have occurred, for example Islam "has had a general 'globalising' thrust" (1992: 28); but at present, and presumably for the foreseeable future, it is these essentially western reference points (although Robertson does not give them this label) which have come to dominate. The end result is, in Robertson's words, a trend towards "unicity", as distinct from homogeneity or heterogeneity.

To develop his analysis of global interaction, Robertson stresses the need to focus

on empirical situations, “on actual intersocietal and intercivilisational encounters” (1992: 41), and at this point he introduces the keynote notion of syncretisation, as a way of conceptualising how these encounters work.

Syncretisation is an idea derived from the study of religious systems, and is defined by Robertson as the “mingling of two or more religious traditions” (1992: 94). As this definition suggests, syncretisation appears once again to involve an integrative understanding of global encounters, a point also made by Robertson’s empirical example that deals with religion in Japan. Japanese religion, Robertson suggests, represents a mixture of different traditions, which operate not to contradict but to legitimate each other. At an individual level this involves the acceptance, perhaps even the expectation, of the peaceable coexistence of different religious perspectives expressed by the saying “... Shinto is for life and Buddhism is for death.” (1992: 94). Once again this understanding of global interaction as syncretisation allows Robertson to incorporate into his analysis ideas of uniqueness and discontinuity, wholeness and continuity.

Robertson’s analysis of globalisation is important because it provides a way into examining the relationship between disembodied global ideas and statements, and the concrete experiences of global actors at all levels. Another way of looking at the same problem is the work of Appadurai who presents a very different picture of global consciousness, one that focuses on disjuncture rather than integration,



tension rather than syncretisation (1990; 1996). He addresses what he calls the “global cultural flow” through a series of “scapes”, understood as subjectively governed networks of abstract ideas and concrete experiences, loosely organised into five groupings: ethnoscaples, technoscaples, finanscaples, ideo and media scaples (1990: 296). Appadurai sees these groupings, which fulfill a similar function to Robertson’s reference points, as containing the “building blocks” of the “imagined worlds” of global actors (1990: 296). This approach to the dynamics of global consciousness though, suggests the potential for a multiplicity of ways of conceptualising the “world as a whole”, according to the various ways that actors select these blocks and assemble them; a multiplicity signified by Appadurai’s recasting of Anderson’s descriptor as “imagined *worlds*.” Adding another level of complexity, Appadurai states that at the “core” of his model is the idea that there is a “growing disjuncture” between the groupings or scaples. Cultural scaples inevitably overlap, but he suggests that the relationship between them changes as the speed of global interaction intensifies by means of technology and also through the increased movement of money, goods, and global actors themselves, all of which encourages the development of incoherence. As a result, the overall picture of global interaction proposed by Appadurai, is of a spiralling *disconnection* quite at odds with Robertson’s movement towards unicity.

Of particular relevance to any discussion of international legal standards, is Appadurai’s characterisation of ideoscaples. These he describes as a “concatenation

of images” of political and ideological ideas, ideas such as democracy and rights, derived from “elements of the Enlightened world- view” (1990: 299). As Appadurai acknowledges, within the western perspective these ideas have a certain coherence, but, he argues “their diaspora across the world... has loosened the internal coherence”(1990: 299). As politically charged ideas are translated from context to context, their meanings become fluid and unpredictable, informed by the process of communication and the context into which they are introduced. The concepts of rights and democracy have a global resonance, but the ways in which they are used and understood in China and the United States, or amongst Tamil and Sinhala chauvinists are not necessarily equivalent.

Appadurai suggests that this “differential diaspora” (1990: 300) of ideas requires closer attention, and this suggestion raises a point that is crucial to my analysis: the way in which international legal standards on child labour operate in Sri Lanka. Appadurai’s model indicates that their operation may be unpredictable as ideas of rights and child work are reformulated to meet the demands of the Sri Lankan context. Robertson, on the other hand, would presumably argue that the interaction between “global” and Sri Lankan ideas of children and rights will result in an accommodation in which wholeness and discontinuity are preserved. Who is right?

## **Globalisation and Child Rights.**

Theories of globalisation have influenced the analysis of some child rights commentators. Burman, for example, draws on Appadurai's analysis when suggesting that rights should be conceptualised as a globalised discourse, rather than as reflecting either local or global ideas (1996: 48). By this she means that rights should be seen in dynamic terms, shaped by the interaction of local agendas, international relations and normative ideas, but equally as one in which specific ("northern") perspectives tend to dominate. Having defined the rights discourse in these terms she goes on to detail her concerns, concerns that I share, about the potential of rights to support the "naturalization of normative evaluations about what children are, and should be like" (1996:49). As she suggests, rights become not simply legal claims, but expressions of *the* right way to secure appropriate child development, (1996: 62), a tendency towards naturalisation that she sees as "inherent to the enterprise of liberal rights" (1996: 54).

Burman's response to this rights based entrenchment of northern models of childhood is to propose (although she does not use this phrase) that rights should be made more culturally sensitive, while being retained as "a broad ethical framework" (1996: 63). This she suggests is a way forward down the "difficult path" between cultural imperialism and relativism. More specifically she argues, following Parker, that the best interests principle should be interpreted in terms of

local conceptions of childhood, while the CRC remains a frame of reference.

An-na'im's analysis is also concerned to make child rights more culturally sensitive (1994). He takes as a basic premise that child related norms can be and may continue to be divergent. This he treats as problematic in the context of the promulgation of a set of international child rights standards (1994: 63). His proposed solution, reflecting the idea that cultures are inherently flexible and interactive, is the widespread adoption of procedures which promote dialogue and challenge power relations in the definition and implementation of the principle of best interest in a cultural context. For instance he discusses what he describes as the dilemma of child labour. It may be proposed to prohibit child labour where children cannot be safeguarded from its exploitative effects. However who is defining what is and what is not exploitation? What sort of work would be affected? Which children will benefit and how? An-na'im argues that all members of society should be given the opportunity to participate in a debate about these ideas, and enabled to express alternative ideas which can be incorporated into any policy formulation (1994: 78). From this process a genuine normative consensus could emerge, based on an interaction between local ideas ("folk models") and international standards.

An-na'im's approach has much in common with that of Burman. Both recognise the power of dominant discourses in shaping child related norms internationally.

Both argue for the need for a dynamic interaction between local and global ideas of childhood, and An-na'im proposes a model by which such an interaction can occur. There is a difference though, I think, and that is over the level of normative agreement possible internationally. Burman accepts, as I mentioned above, that there is the potential for both an essentialising imperialism and a spiralling relativism in a globalised discourse of rights. However she also argues that "acknowledging the power relations that enter into the production and interpretation of practices may not only relativize, but also, when attended to in their specificity, can fix interpretation." (1996: 63). This would suggest that diverse child rearing practices could be recognised, but the retention of the CRC as a broad ethical framework would establish the limits of this diversity and curtail the "radical indeterminacy" of globalisation. An-na'im goes further. He suggests that, in due course, "a genuine normative consensus" can be achieved on both the definition and implementation of best interests. That this general consensus is not simply intra-cultural is suggested by his anticipation that local ideas, folk models, can be modified to take into account, or used to legitimate, international standards (1994: 69, 80). He seems to anticipate that child development practices can be brought more closely in line with the CRC. An-na'im, then, is suggesting that a truly universal set of norms may be achievable through global cultural interaction, while Burman limits herself to trying to tread successfully "the difficult path between the globalizations of cultural imperialism and the cultural relativism of localized conceptions" (1996: 45).

Burman and An-na'im represent a strand in the child rights debate which, unlike analysts like Donnelly, confronts the question of cultural interaction. It is a question that brings us back to the work of Appadurai and Robertson. Of course Appadurai and Robertson do not exhaust the various perspectives on global interaction (for instance Santos 1995), but they do provide interesting and contrasting scenarios.

### **Globalisation and Chaos.**

What is striking about the globalisation debate is the way that it reproduces that central dynamic of the Enlightened universe already discussed in connection with rights, the dynamic of difference: the relation of self to other, global to local, universal to particular. In many ways globalisation amounts to a reincarnation of the relativism- universalism debate. But an underlying assumption is that globalisation reflects a change in the relation between the universal and particular. Robertson's analysis is a case in point.

Robertson's treatment of the relation between the universal and the particular is consistent with his idea of a growing, integrative or syncretic unicity. Relativism, in his terms, "involves, for the most part, [a] refusal to make any general 'universalising' sense of the problems posed by sharp discontinuities between different forms of collective and individual life..." (1992: 99). At the other

extreme, Robertson suggests, is “worldism”, which is based upon the claim that it is possible to grasp the world as an analytical whole, a position which presumably involves a bias towards sameness as opposed to the radical difference of relativism. Robertson’s analysis, on the other hand, involves the attempt to encompass the pressures towards sameness and difference in global interaction. More specifically, he suggests that the relation between universalism and particularism is a “basic feature of the human condition” thematised “with the rise of the great religiocultural traditions...” (1992: 101). Further, he argues, this same relation is increasingly important in structuring understandings of the world as a whole. There is now an experience of both particularism and universalism (for example in the influence of concepts such as “humanity” and “the individual”) to the extent that what we are seeing is a “massive twofold process involving *the interpenetration of the universalisation of particularism and the particularisation of universalism...*” (1992: 100, italics in the original). Universalism and particularism, he suggests, are “basically complementary” (1992: 103).

An-na'im shares with Robertson the idea of the potential for an integrative wholeness in global interactions, in his case encapsulated in the idea of a “genuine” normative consensus. But the implications of both accounts is that interpenetration or consensus will proceed in line with a western ontology. As already noted, Robertson anticipates that global actors will relativise themselves in terms of concepts such as the nation state and the individual. If this is the case,

then it is possible that alternative ontologies, those that stress ideas of community for instance, will be excluded. An-na'im recognises the problem and hopes to address it through his model of dialogue. However he accepts that "southern" theorists are in fact constrained by western ways of conceptualising childhood (1994: 76), making effective dialogue difficult. Indeed western ideas have shaped his own approach. He does not hide his own personal commitment to the principles set by the CRC (1994: 64). In both cases then integration or consensus may be at the price of exclusion. As such the new global relations envisaged by Robertson and by An-na'im may amount to no more than a continuation of the same old relations of power under a new name (Fitzpatrick nd), but the construct of "globalisation" allows this continuity to be obscured.

Appadurai provides a different way of conceptualising international relations, one that conflicts with that of Robertson (and also of An-na'im). It is a conflict which is made apparent in his opening statement, "The central problem of today's global interactions is the tension between cultural homogenisation and cultural heterogenisation" (1990: 295). In Appadurai's terms, against the background of the moving landscapes of ideas, the potential exists for equally fractured and disjunctive apprehensions of sameness and other. Forces of homogenisation, deployed by states, aspiring nationalisms, campaign groups and intellectuals, interact with trends towards heterogeneity deployed by states, aspiring nationalisms et cetera. In terms of child rights the conflicting trends can be seen in



the rush to ratify the CRC, combined with the widespread failure to implement it identified by Burman (1996: 52). Political agendas demand simultaneously that states sign up as a mark of their civilised nature, and that local, especially religious, values associated with children and family be respected and promoted. The result, Appadurai suggests, is the “mutual effort of sameness and difference to cannibalise one another and thus to proclaim their successful hijacking of the twin Enlightenment ideas of the triumphantly universal and the resiliently particular.” (1990: 307).

There is a difference of rhythm in the accounts of Appadurai and Robertson. Appadurai’s account stresses the disordered nature of international interaction. On the other hand, Robertson’s notions of syncretisation and relativisation suggest an ordered approach to change. This seems to hold even while he acknowledges, as he repeatedly does, an ever present discontinuity and difference, or when he says that “with some misgivings...in ‘the last analysis’ ...I am just as much concerned with ‘the order of global disorder.’” (1992: 83).

Appadurai proposes the use of a “chaotic” approach to understanding global interaction (1996: 46) and this is reflected in the model that he presents. Chaos, in this sense, refers to theoretical developments in physics and mathematics over the last three decades. As is often the case these developments are reflexive in their relation to other strands of western thought, including sociology.

A key concept of chaos theory, one that relates to Appadurai's discussion of the "differential diaspora" of ideas, is that of dependent sensitivity to initial conditions. This concept marks a distinctive departure from classical physics in its treatment of systems modelling and variation. In brief (following Gleick's description in "Chaos" 1987), classical physics employs a strategy of simplification in order to reach an understanding of physical systems. Systems are reduced to their component parts and reproduced in mathematical models which seek to approximate, rather than match exactly, the system's dimensions. Underlying this strategy is the assumption that small variations in the structure of a system will have negligible consequences for an understanding of the system as a whole. This assumption was exploded by the work of Lorenz amongst others. He found that small variations could have enormous consequences, a concept which he illustrated by reference to his chaotic water wheel. As might be expected, the flow of water on to the wheel causes it to rotate, a rotation that settles into a generally regular pattern. However, at a given rate of flow, the wheel begins to spin irregularly, and contrary to classical physics, *never* establishes a regular, predictable pattern. The change in the rate of flow in the system's initial condition, results in a change of behaviour from predictability to complete unpredictability. May, a biologist, had a similar result when he explored the behaviour of the logistic difference equation which is used to project population growth in ecological systems. Huge irregular fluctuations in population growth resulted from changes in the rate of growth. Once again, chaos is the result of small variations in

initial conditions.

The work of chaos theorists, including May and Lorenz, has been increasingly understood as indicating that physical systems are not necessarily predictable. This possibility has considerable implications for the way that the world is conceptualised, not least amongst physicists. Chaos disrupts the sense of an ordered universe, derived from physics' Newtonian heritage, the sense that it is possible to "summarise the complexity of the world in a few simple rules" (Kadanoff 1993: 403). On the contrary the chaotic behaviour of Lorenz's water wheel demonstrated the existence of a radical disorder. Applied to Appadurai's model of the global system, with its potential for a multiplicity of initial conditions in terms of the imagined worlds of global actors, chaos theory suggests that the differential diaspora of ideas may produce not simply global disorder in the sense used by Robertson above, but radical, unpredictable disorder in ways of conceptualising the world. Again in terms of child rights, this suggests that there may be a wide and unpredictable diversity of approaches, with different perspectives on children rejected, hybridised, or treated inclusively. Burman recognises this possibility when she suggests that rights are "unlikely to function as a direct equivalent to their originally western forms... since they operate in different political and material contexts." (1996: 48). Clearly this is a very different scenario for the operation of child rights than one based on Robertson's analysis. I intend to explore both scenarios in this thesis.

## Chaotic Rights?

Chaos theory may also be a useful metaphor for developing approaches to international legal theory. Another version of difference which has been important in structuring ideas, particularly with regard to law, is precisely the relationship between order and disorder. For instance, the juxtaposition of law and disorder is a significant theme in Hart's "Concept of Law" (1975). In a discussion of natural law, he suggests that it should have "as a minimum content" rules which secure "the minimum purpose of survival which men have in associating with each other" (1975: 189). Unravelling this point a little, Hart's argument seems to be that the fundamental aim of human beings is to survive; survival may be achieved through social arrangements; and certain rules, "truisms" derived from "elementary truths about human beings" provide the basic structure of the necessary social arrangements.

The truisms identified by Hart seem to reflect a specific form of arrangement through which to achieve survival. An arrangement in which human vulnerability and potential aggression are recognised, as is the finite nature of resources, resulting in the need to respect a concept of property. As part of this social set up, which bears more than a passing resemblance to existing "developed" societies, Hart includes the need to secure "*voluntary* co-operation in a *coercive* system" (1975: 193, italics in original). This requirement exists because even though all

citizens may recognise the need to protect collective interests in order for society to survive, “all are tempted at times to prefer their own immediate interests and, in the absence of a special organisation... many would succumb to the temptation” (1975: 193). Therefore those who cooperate to support social order, should be protected from those who do not, or cannot, by a special organisation, in other words by law.

As Fitzpatrick comments (1992) Hart’s analysis establishes law as an ordering order. Order is a prerequisite and law delivers it (1992:196). Further, Fitzpatrick argues (1992; 1995), law acts as a bulwark against disorder, a specific form of disorder, the disorder of the “other”.

In discussing the relationship between self and other, Fitzpatrick charts the development of a western perspective in which the natural order found in non western societies is both recognised by, and distinguished from, the civilised, artificial order of western societies (1995). This perspective involves the application of what he designates the principle of “incommensurability”, which he suggests has informed western thought. Incommensurability demands the acceptance of the internally incoherent assumption that all societies, peoples, cannot know each other. As a result the characteristics of non western societies are external to western in the sense of being absolutely different, unknown; but at the same time, by being external they also surround and encompass western societies.

Civilised order, legal order, Hart's voluntary, coercive system, is what distinguishes western social organisation, and prevents disintegration into the surrounding partial disorder of the natural, non western state. Law, then, reproduces western social identity in its encounter with non western groups, excluding other accounts of order. It is, Fitzpatrick suggests, a reproduction that occurs in the application of western law to "indigenous" (for want of a better word) peoples, and of post colonial law in law courts throughout the non western world. He cites a study demonstrating the alienation of Metizo Indians in Mexican courts. It was found that cases of elopement which were of little social consequence in Metizo society, were treated as criminal by the courts; in contrast a more significant failure, the failure to produce rain, was dealt with more leniently by the courts (1995: 96). It is my contention that a similar mismatch of expectations occurs, less dramatically, in the Specialist Court in Sri Lanka, but one which nonetheless succeeds in excluding alternative accounts and in reinforcing dominant ideas about children.

Fitzpatrick suggests that there have been two distinct responses to this process of exclusion. Some have argued for the recognition of non western values as opposed to those of the west, an argument which as Fitzpatrick points out, reinforces the juxtaposition of west and non west, self and other. In contrast, a more "transgressive" approach, has been to deny the categorisation of self and other, and to propose a different perspective through which to order identity. Again though,

the attempt to overcome the original categorisation demands a recognition of its existence and of its dominance (1995: 110). An alternative strategy, proposed by Fitzpatrick, involves neither the rejection of the original categorisation, nor the perpetuation of the other as different. Instead, he argues, that an effective approach would be the recognition of the other as the self; a recognition that would allow “the excluded... to re-enter” (112) and in so doing dissolve the opposition on which western identity is based.

Fitzpatrick’s argument that the excluded be included has implications for the way that order is understood. If, in the dominant perspective, western order is opposed to non western disorder, a process of inclusion would demand a disruption of order, and an eruption of disorder into order. A dissolution of difference. It is at this point that one can begin to pick up resonances between Fitzpatrick’s analysis and elements of chaos theory. Chaos theory, as already suggested, appears to indicate the disruption of order, of an ordered understanding of systems. At a given point systems will dissolve into disorder and become completely unpredictable. Yet chaos theory is itself unpredictable, because it is at least arguable that it rescues order from chaos.

May’s “logistic difference equation” generated both huge a-periodic fluctuations in population growth, and also occasions when growth entered a regular cycle, “windows of order inside chaos” (Gleick 1987: 74). Similarly, the work of

Feigenbaum and Mandelbrot suggests that patterns are perceptible in the disorder that chaos describes. Feigenbaum took a similar type of equation to that explored by May, and demonstrated the same sort of fluctuations in behaviour. He examined the moments of transition, of fluctuation, and found a relationship between them; further he found similar relationships being generated in other, functionally distinct, types of equations. The implication being that chaos and order coexist. What chaos theory demands then is a new sense of order, one that includes disorder. Physicists can no longer “summarize the complexity of the world in a few simple laws...”, but must instead “attempt to construct laws for chaos” (Kadanoff: 403). By analogy, and following Fitzpatrick’s example, social laws may need to make the same attempt. An attempt which will involve inserting complexity into a “few simple laws”, including child rights. My analysis attempts to explore the relevance of this approach. Is this an alternative way to address the power operating through the rights discourse? Can difference be dissolved?

Burman, of course, could be said to be confronting complexity. She suggests that the CRC can be retained as simply an ethical framework, one that provides the basis for a wide range of variety approaches to child development. By this means she seems to be trying to establish limits to diversity while at the same time recognising difference. A complex order is rescued from chaos, a “difficult path” illuminated. But does she go far enough? Can rights be inclusive as Baxi suggests? Are the normative ideas that underpin rights sufficiently flexible to accommodate



different accounts of childhood, even to the extent that Burman proposes? Is the ethical framework of the CRC separable from the vision of society, of the role of the family and of the place of the child, that it imports? These are ideas that I come back to in the course of my analysis.

I begin by looking in the next chapter at the way children are represented in the international rights discourse, and I should say at the outset that I have some reservations about the uncomplicated image of childhood that this discourse reproduces. To summarise my argument in one sentence, the international discourse is problematic because it supports the condemnation of child domestic service, but does not address the complexity of children's lives. This is the position I will defend, and elaborate upon, in the following chapters.

## **Chapter 2.**

### **Constructing Children.**

#### **Introduction.**

In the last chapter I discussed different ways of looking at how child rights work. As I suggested, rights are frequently seen as empowering, challenging existing stereotypes of children. Another argument is that child rights are flexible, with the potential to include different ideas of childhood. A counter argument is that child rights act to exclude these ideas, reinforcing a particular understanding of children. In this chapter I begin to look at what actually happens in practice, at the international level. I start by looking at the content of the international child rights discourse, the images of children presented, before considering in some detail the norms underlying the images, and the constructions of children they support. On the basis of this discussion I argue that rights construct children in a way that is potentially disempowering, and as an associated point, that the inclusive potential of rights is limited, contra Roche, Burman and Baxi, amongst others. Taking this point further, I suggest in the final section of the chapter that the idea of inclusivity, of consensus, is used, ironically, to promulgate an exclusive discourse of rights.

The main source of material for my analysis in this chapter is the United Nations

(UN), chosen as the origin of pronouncements which have an international dimension if not (necessarily) an international impact. The basic position of the General Assembly as a whole was initially articulated in the Declaration of the Rights of the Child (1959) which stated that children should not be permitted to work in a way that would prejudice health or education or interfere with development (Principle 9). This formulation was subsequently translated into the more specific (and binding) wording of article 32 of the United Nations Convention on the Rights of the Child (see Appendix 1).

The Declaration of the Rights of the Child was antedated by several conventions sponsored by the International Labour Organisation (ILO)<sup>1</sup>, which restricted the admission of children to employment. As ILO literature reiterates, the organisation has been concerned with child labour since its inception. In contrast the United Nations Children's Fund (UNICEF), as the United Nations's body designated to address children's interests, has only more recently begun to focus on child work (UNICEF 1986b). This development has been reinforced by UNICEF's role as implementation agency for the CRC and a coordination agreement with the ILO (ILO 1996c).

Out of the stream of reports, conferences, and international conventions generated by the UN in connection with this history I will pick out five in particular. ILO

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<sup>1</sup>

For example No 5 (1919); No 7 (1920); No 10 and No 15 (1921).

Convention 138 (1973) represents one of the first attempts to set comprehensive international standards on child work, although it has not so far been widely ratified<sup>2</sup>. On the other hand all shades of child rights proponents refer to the United Nations Convention on the Rights of the Child (the CRC) as a way forward for children. Adopted by the General Assembly in 1989, the CRC is the most widely ratified human rights treaty (see Appendix 1 for selected articles). Only Somalia and the United States of America are yet to ratify (UNICEF 1997a). This near total ratification suggests a widespread commitment to a rights based programme for children, despite the entry of reservations against some of the articles (26 out of 54 in 1994 (Bissett - Johnson 1994)). The CRC is a comprehensive attempt to address children's needs, combining economic, social, cultural, civil and political rights in its text. The wide ranging nature of the needs addressed, together with its apparent general acceptance, make the CRC an obvious document to discuss. In addition the travaux preparatoire for the CRC include a series of international deliberations on child work which stretched over a decade, and which may act as a supplementary means of interpreting the CRC in the event of uncertainty<sup>3</sup>. Contemporary with the travaux is a report prepared by UNICEF in 1986 "Exploitation of Working and Street Children" (UNICEF 1986a). This provides a summary of ideas on child work, and a relatively early statement of UNICEF's position on working children. Jumping forward 11 years I will examine the background papers to two conferences held in

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74 countries ratified "as of today", 17 June 1999 (ILO 1999e).

3

Vienna Convention on the Law of Treaties section 32 (see Detrick 1992: 113).

1997 in Amsterdam and Oslo, both involving the ILO and UNICEF and both dedicated to the topic of child work.

Any examination of these representatives of an international discourse resolves itself into a discussion of images, one dimensional images of children and the state of being a child. I will illustrate this statement through providing a snapshot of the history of the CRC.

As already suggested the CRC is the product of protracted negotiations, between a fluctuating group of state representatives, extending over 11 years (1978- 1989). During that period there were significant changes in the world economic environment accompanied by shifts in power between nation states. It is rare, if ever, that this shadowy background impinges upon the bright uncomplicated images projected by the travaux preparatoire. No indication is given of why the original Polish proposal for a convention was greeted so cautiously in 1978. What accounts for the alliances discernable but unacknowledged within the CRC Working Group? For example, why were Britain and Canada more influential than Bangladesh in discussions about educational resources.

The tensions implicit in these discussions are unexplored, the names of participants to the debate are omitted and changes in direction left unexplained. The final image of the CRC and the related negotiating process contains no shadows, the context has been removed. As a result it appears to be a process in which a consensus about

children, families and states is articulated and a process which could have occurred at any time and in any place.

Crucially it is not the only process that is decontextualised but the norms themselves. Colombia's plea that the child should not be regarded “as an abstract subject alien to any objective reality” (Detrick 1992: 81 E/CN.4/1324/add.2) appears to have been ignored. By this I do not mean that the child's general environment was ignored. Children's interests in various different circumstances are the subject matter of the CRC. The child's needs in the context of work, education and the family are all addressed. But more fundamentally, the norms associated with these aspects of children and their lives are unexplored, “the child” remains an abstract subject. It is the shadows of these norms that I am chasing in my exploration of the UN texts.

### **Images of Children.**

My intention in this section is simply to display images of children as presented in the selected documents, before going on to discuss them in greater detail further on. I will focus on the images of children associated with three main themes: work, education and the family. All three themes are combined in the final characterisation of child domestic servants as they appear in the various texts.

## A. Children and Work.

“Children have always worked” ;

“In agricultural and rural areas this age-old system can even be beneficial as an informal preparation and training for the tasks of adulthood...”;

“...the introduction of broader opportunities for formal education may change traditional child work into child exploitation.” (UNICEF 1986a :3).

The first few paragraphs of “Exploitation of Working Children” introduce three ideas which recur in the portrayal of child workers. In stating that children have always worked there is a suggestion of a continuous historical experience of child work, combined with an idea of a timeless past. In this past, this “age old system” work can be beneficial, a process of introduction to the adult world. In contrast, where this system has changed, work becomes a danger to the child’s future.

In this formulation it is now education that creates life opportunities, not work. “Lack of schooling perpetuates a bleak and hopeless status quo, barring the way to any sort of advancement of a better life” (UNICEF 1986a: 8 citing Dogramaci. See also ILO 1997a: paragraph 29 and ILO and UNICEF 1997b). Although education is not specifically defined in the report, references suggest that it is understood as a school based, institutional activity. A major consequence then of using education as a basic measure of exploitation, is to exclude children from virtually all work that takes place outside the school room. The working child of traditional societies is seamlessly

transformed into the exploited child of the modern world. It is this configuration of child workers that sets the tone for the whole report, and indeed it is one that is reflected throughout the whole discourse.

Another aspect of this formulation is that although virtually all work is treated as exploitative, some work is more exploitative than others<sup>4</sup>. Indicators for particularly bad occupations are identified by UNICEF. These include: poor work conditions; work that does not facilitate development; and work that inhibits self esteem (1986a). ILO Convention 138 distinguishes between different types of work by setting a higher minimum age of employment for work “likely to jeopardise health, safety or morals of young persons” (article 3). This provision is complemented by article 5 (3) which lists various employments which cannot be excluded from the provisions of the convention, including mining, manufacturing, construction, transport and plantation agriculture. In sum, the basic position indicated by both UNICEF and ILO is that work is an unhealthy, unrewarding and inappropriate business for children.

## B. Children and Education.

The juxtaposition of child work (almost always bad) and education (good) is also to found in the deliberations of the UN Working Group on child rights and in their final product the CRC. There is a change in emphasis from the first working draft of article

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<sup>4</sup>

This is the basic premise of the recent Worst Forms of Child Labour Convention 1999 (ILO No 182).



32 to the finished form. Originally stress was laid upon economic exploitation that was dangerous to life and harmful to health and moral development. This shifted to protection from work that is likely to be hazardous or to interfere with education or be harmful to development. Interference with education was affirmed as a basic criterion for determining exploitation.

Article 32 is complemented by the right to education established by article 28 (see Appendix 1). To facilitate this right the responsibility is placed upon states to support both primary and secondary education, with the requirement that at least primary education should be compulsory and free. The fact that this requirement, which demands high levels of state investment, was accepted (with some practical reservations made by states such as Bangladesh) by the members of the Working Group, indicates the significance given to education by the drafters. Indeed, although the resources to provide education might be an issue the necessity for education itself was not called into question.

Article 29 of the CRC sets the agenda for the content of educational programmes (see Appendix 1). As with other articles of the CRC it represents an expansion of the original draft. In this case ideas about the necessity for preparation of the child for life, through "upbringing and education" have been translated into a more detailed programme specifically linked to education. Although not going as far as proposals from the Baha'i International Community which included a requirement for education to "protect the child by developing his ability to resist outside influences or pressures

likely to lead him into lawlessness or delinquency" (Detrick 1992), the idea of shaping child development remains important. Children should be taught respect for human rights, their parents and the natural environment; they should also be learn to be 'responsible" within in a "free society". A child's education should promote development and appropriate, democratic, behaviour within society.

### C. Children and the Family.

During the discussions on article 28 the relationship between state and parental responsibilities for children's education was raised. Many of the early drafts contained the wording "State Parties ...shall respect the rights and duties of the parents and, where applicable, legal guardians, to provide direction to the child in the exercise of his right to education...", wording which was finally located in article 5 (Detrick 1992: 387) This approach suggests that while "education" is something provided by the state, "direction and guidance" are the preserve of the parents and family. A suggestion which is also made in the preliminary comments to the Commission on Human Rights by the International Union of Judges "School should be viewed as a social institution which completes the work of the family" (Detrick 1992: 69). In differentiating between state education and family responsibility, what is in fact happening is the articulation of a distinction which suffuses the whole CRC and the originating debates; the distinction between public and private spheres of life.

The kernel of this idea first appeared in the embryonic convention during discussions

in 1980 about the preamble and proto article 3. It is from these discussions that the family emerges as both a symbol for society, "the human family", and as its "fundamental group" (preambular paragraphs 1 and 5). This group is one which has both responsibilities and rights over child; one which demands both support and non interference from the outside, the state (articles 3 and 5).

These differing roles and requirements lead to nature of family role being both specific and inchoate. It is specific in that "parents", "legal guardians" and occasionally "others" owe responsibilities to children, and in performing those responsibilities need to achieve certain goals, including the delivery of "an atmosphere of happiness, love and understanding", "support of evolving capacities" and "appropriate direction and guidance" (preamble; article 5). However the boundaries of the role are indistinct, and how they are to be achieved is also uncertain. In particular it is unclear at what stage state support or intervention should be triggered. The nature of the family role is left equally undefined. What does "appropriate" direction actually mean?

The difficulty of articulation is apparent from the Working Group's discussions of article 5 (see Appendix 1), although the debates surrounding articles 3, 18 and 19 would be equally illustrative. In these discussions the representative of the United States of America "explained" that his country attached great importance to the family, such that it needed to be explicitly protected (from society and state) and that this protection should be stressed early on in the CRC. The representative of the

Federal Republic of Germany took this line one stage further. He suggested that the CRC should not deal with the private sphere at all, it should only address the public relationship between the child and the state. Canada opposed this position, the child's development should not be left solely to the wishes of the family. "Any protection from the state given to the family must be equally balanced with protection of the child within the family" (Detrick 1992: 158).

Apart from the representative of the Federal Republic of Germany, the members of the working group appeared to feel that a balance needed to be struck and to believe that in the final draft of article 5 that this balance had been achieved<sup>5</sup>. The balance between state (as protector of children) and family (as both protector of children and private group) was reformulated in the discussions into the need to equalize the rights of the child and the correlative rights of the parents. In other words the rights of the child were to be used to achieve the correct balance between the state and the family. (Detrick 1992: 159 E/CN.4/1988/28: 7-9).

There is a need to get the balance right, between child and family, and the state and parents, but the naturalness of the family, as expressed in the preamble to the CRC, is never questioned. The law, in purporting to define family relationships and the role of the state (for instance through the definition of carers as "parents" and "legal guardians" in article 5), is merely reproducing a natural state of affairs. So much so

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See also Hammarberg 1990: 100- 101.

that the addition of "others" to the list of carers and therefore to those with rights over the child was resisted (unsuccessfully) on the basis that it would upset the "traditional triangular responsibility for the child" (Detrick 1992: 161 E/CN.4/1989/48:31-32).

As with socialisation, the distinction between public and private spheres has implications for the responses to child work. Although article 32 demands that children are protected from all forms of exploitative work, a distinction is made between forms of work and employment. It is specifically employment (work for non family members) that is to be regulated. The representative of the United States of America successfully proposed the deletion of the word "work" from paragraph 2 (a) of article 32, dealing with regulative provisions, and "many delegations expressed their support deeming it more appropriate that only [sic] the subparagraph in question be confined only [sic] to the concept of admission to employment because it does not apply to work in and for the family". (Detrick 1992: 422).

This idea that there is less need to regulate a child's work within the family is fed not only by the resistance to external interference inherent in the public/ private dichotomy, but also by the image of the family as a safe and natural place for children, an image already invoked by the CRC. Children are not likely to be at risk there (although that the potential exists is recognised by article 19). The risk to children is not posed by the family but by the absence of family. Thus, in the context of child work, it is children who leave the family environment who have greater need for protection through regulation. Children such as child domestic servants.

The situation of child domestic servants is mentioned in the 1986 UNICEF report :  
“Less dramatic, but even more pervasive...” than child slavery or prostitution (1986a).  
This is a characterisation that was expanded upon in the Amsterdam and Oslo  
Conferences on Child Labour held in 1997.

Both Conferences were part of a process to infuse meaning and effect into the  
international standards on child labour. A significant part of this process involved  
clarification of what child labour and child exploitation actually involved, before  
going on to consider strategies for its elimination.

Similar approaches to the definition of child labour were taken at both Amsterdam  
and Oslo. For instance the main ILO background paper at the Amsterdam Conference  
defines child labour as “work carried out to the detriment of the child and in violation  
of international law and national legislation.”(ILO 1997a: paragraph 6). This is  
understood as involving children in long hours of work (whether paid or unpaid) “for  
low wages, often under conditions harmful to their health and to their physical and  
mental development... sometimes separated from their families and... frequently  
deprived of education” (paragraph 6). This analysis is later amplified by the statement  
that “Child labour...involves harmful work with one or more hazards-physical,  
chemical, biological or psychological. These are often not only cumulative but also  
magnified by their synergic interaction.” (ILO 1997a: paragraph 13)

Child labour of this sort is distinguished from child work in relatively harmless

activities such as the transmission of skills by parents, although it is acknowledged that this too has “its problems, especially as regards the children's health and safety and their schooling”(ILO 1997a: paragraph 5). Similarly working “for few hours to earn pocket money to buy the latest sports shoes or electronic gadgets” is treated as generally harmless (ILO 1997a: paragraph 6).

Within this wide ranging definition of exploitative child labour, some activities attract special concern, including child domestic service. Described as a “less formal and more subtle form” of slavery, domestic service is singled out as having extremely adverse effects on children:

“They [child servants] are sometimes obliged to work very long hours, deprived of family contact, schooling, leisure, emotional support and social interaction. They are also frequently subjected to beatings, insults and sexual abuse.” (ILO and UNICEF 1997b: paragraph 20).

Similar concerns were expressed in relation to servants of both sexes at the Amsterdam Conference:

“Hours of work tend to be long. The children are deprived of affection. Many are physically and psychologically ill-treated; beatings, insults, punishment by being deprived of food, and sexual abuse are known to be common. Consequently, it is not unusual for girls to run away from

their employer's house, and often they end up working as prostitutes”  
(ILO1997a: paragraph 25).

This characterisation of child servants suggests that they are exposed to a combination of the various hazards of child labour identified by the ILO at Amsterdam. Not only are they vulnerable to physical and psychological abuse, but they are also deprived of education and social interaction. Indeed, “Young girls employed as domestic servants may well be among the most exploited children of all.” (ILO and UNICEF 1997b: paragraph 20).

It is not ordinary domestic work in the family home that is so exploitative. As the ILO Background Document (ILO 1997a: paragraph 5) suggests, this type of activity has its problems, but it is specifically excluded from the concept of child labour. Again, children carrying out “services of a domestic nature” in the family home, are not treated as child workers for the purpose of calculating the frequently cited figure of 250 million children worldwide, who form the target of both the Amsterdam and Oslo Conferences (ILO 1997c). As with the discussions surrounding article 32.2 of the CRC, the child servants who are the subject of concern here, are those who work outside the family home, who are “deprived of family contact” and vulnerable to abuse from other people’s families.

The perception that child work is nearly always necessarily bad, together with the simultaneous juxtaposition of child work with education, and the family home with



the work environment in these UN documents, all contribute to this characterisation of the exploitative nature of child domestic service. Where do these perceptions come from? Why is work bad for children ? Why does child domestic work become child labour, and a particularly worrying form of child labour at that, when it is translated from the biological family home into another home? Why is it perceived as an invariable fact that children are abused psychologically as child servants? In the following section I will discuss some of the ideas underlying this approach to child domestic service.

### **Working Children.**

As is obvious from the documents discussed in the last section, the idea that children should not work is an important aspect of international policies on children. It is complemented by an expectation that adults will work, an expectation embodied in article 27 of the CRC which requires adults to provide an adequate standard of living for children. This approach to work seems to express the existence of some absolute distinction between children and adults. The existence of such a distinction is also indicated in the preamble which articulates the principles underlying the CRC. Paragraph 4 states that “ childhood is entitled to special care and assistance”, and paragraph 9 suggests that “...the child, by reason of his physical and mental immaturity, needs special safeguards and care,...before as well as after birth.” Taken together, these two paragraphs attribute to children as a group, specific qualities and a special status, quite distinct from other members of society.

The insertion of paragraph 9 into the preamble was contentious because of the suggestion that a child was a child before birth, with all the obvious implications for abortion and contraception. In contrast neither the qualities attributed to children, nor the special status of childhood referred to in paragraph 4, were questioned at all. This is perhaps not surprising since both paragraphs rehearse principles expressed in earlier United Nations' conventions<sup>6</sup>. It is here that the impact of *difference* needs to be discussed in some detail. As stated in Chapter 1, I consider that this distinction between adults and children is a distinction which has shaped international discourse, including United Nations conventions, and that it is fundamental to the way children, including working children, are perceived.

Disciplines which focus on children, disciplines such as child psychology, child development and child rights incorporate the adult/child distinction in their analysis. It is taken as a given, one that is based upon the biological characteristics of adults and children. Children in these terms are physically and mentally immature; adults have achieved maturity. Margaret Mead in her classic analysis of children and childhood illustrates this statement "...we start with a recognition of the *biologically given*, of what all human beings have in common. In every human society, human infants are born helpless and relatively undeveloped, dependent upon adult nurture..." (Mead 1955:6, italics added).

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Universal Declaration of Human Rights and the Declaration of the Rights of the Child 1948.

In a biological framework the conceptualisation of children is dominated by the idea of development: the movement from immaturity to maturity. As a biological process development is susceptible to scientific analysis. Physical growth can be charted and divided into stages according to chronological age. Expectations of specific motor skills, motor development, growth, hearing, and vision can be attributed to each age group. This is the basis of centile charts and the developmental tests which are integral to the monitoring of children in many western countries (see for example the aptly named British textbook for health professionals, the “Child Surveillance Handbook” 1990).

It is not only physical growth that can be measured. Cognitive and affective characteristics can be similarly identified. This is the foundation of another classic of the discourse on children, “Beyond the Best Interests of the Child” (1973). The concern of the authors, Goldstein Freud and Solnit, is to ensure that the legal process is informed by psychological theory of children’s emotional needs. They begin by making the basic distinction between children and adults, in this case in terms of the distinguishing features of children’s “mental makeup”. Chapter 2 lists specific mental characteristics of children. This list includes suggestions that: children’s psychic functioning changes constantly from one stage of growth to another; children experience a different sense of time from adults and perceive events in egocentric terms; and finally that children are “governed in much of their functioning by the irrational parts of their minds, i.e., their primitive wishes and impulses.” (Goldstein

et al 1973: 11). Taken together these specific characteristics form the basis of a psychological analysis, a picture, of children's mental makeup (Goldstein et al 1973).

It is this analysis of children's minds which the authors argue should be the basis of legal decisions about children. Having described what children minds are like, they then go on identify what their emotional needs are and, taking the argument one stage further, to prescribe ways of meeting those needs in the context of legal proceedings. The approach is summarised in the following lines: "Psychoanalytic theory confirms the substantial limitations on our capacity to make such a prediction [of future needs]. Yet it provides a valuable body of generally applicable knowledge about a child's needs, knowledge which may be translated into guidelines to facilitate decisions which inevitably must be made" (Goldstein et al 1973: 6).

The biologically based scientific framework then, which supports child psychology and other discourses of children, establishes "the child" as a known quantity; an entity that has been explored, described and to a large extent understood. On the basis of this understanding, these discourses go on to identify, and prescribe for, the needs of children, needs which since children are different from adults will also be different from those of adults. As will be seen below, for Goldstein et al, the emotional needs of children revolve around their placement with the right sort of "psychological parents".

Another (for our purposes) significant need of children identified by child psychology

is the need to learn. A whole social edifice has been built upon this identification of which the work of Piaget has been and continues to be an important foundation. (Light, Sheldon and Woodhead 1991; Stainton Rogers 1992; Wallace 1968; Wood 1988). This is despite the fact that Piaget himself was less concerned with the process of learning than the development of cognition in its entirety (Davis 1991).

In his analysis Piaget concentrated on the apparent changes in cognition which take place during childhood. These he conceptualised (in summary) as the establishment of logical thought processes through the internalisation and increasing abstraction of “action-in-the-world” (Wood: 19; Piaget 1991: 7 ). Piaget located specific stages in this process of cognitive development during which (and not before) children underwent “revolutions” in thought. He explicitly, but not exclusively, tied these stages to biological features, emphasising the relationship between intelligence and action (Piaget 1991: 11).

Because of this focus on “action-in-the-world”, Piaget tended to reduce the significance of social interaction in the development of thought. Vygotsky, another influential theorist in this field, took a different approach (Vygotsky 1991). While accepting Piaget’s view that children do not think like adults, he argued for greater recognition of interpersonal relationships and socialisation in the creation of thought and of the personality, and his general perspective is summarised by the statement “Thus we may say that *we become ourselves through others...*” (1991: 39 italics in the original). In particular Vygotsky stressed the importance of assistance in learning,

contrasting the capacity of the child to learn on his or her own, with the enhanced capacity derived from adult guidance.

Both Piaget and Vygotsky make the same distinction between children and adults that can be found in the work of Mead and Goldstein. Indeed the essence of their analysis is that children's cognitive capacity is not only quantitatively different from that of adults, but that it is also *qualitatively* different (Stainton Rogers 1992: 95). This understanding, together with Piaget's explanation of developmental stages which demanded the correct input at the correct time, and Vygotsky's emphasis on supportive interaction with children, has been expanded into a programme for teaching children to learn. It is a programme that has translated into an increasing formalisation of the learning process preferably located in a contingent institution - the school.

So having identified in children a need to learn, the discourses of child psychology, of child development, have also identified how that need may best be met, by sending children to school. It is at this moment that work becomes opposed to schooling. "Even if the work remains the same, the fact that formal education is an option changes the perception and that child work becomes child exploitation if it prohibits children's access to education" (UNICEF 1986a; see also UNICEF 1997a: 3).

In this oppositional relationship work is treated as an economic activity, something done in order to meet the material needs of the individual. It is not a learning activity,

and the work environment, whether the factory, the street, or the home, are not the prescribed locations in which to learn. If children are supposed to be supported in their learning through adult guidance, this guidance needs to be of the right sort, to be derived from adults who are educators and not employers. As a result it is generally better for children to be in school than for them to be at work.

Being better for children is one thing, but the opposition between work and learning goes further than that. It is not only better for children to go to school, children should go to school. The distance between these two statements is the distance between a scientifically established “fact” and a social value, and it is a distance bridged by what Prout and James call “sleights of hand” (Prout 1990: 13).

To recapitulate. The discourse of child development mentioned above contains ideas of progress and evolution, the same ideas which inform debates about *social* development. Implicit in them both is the notion of movement towards a completion and an achievement of potential. Less developed societies can be guided towards their full potential through sound political and economic policies; one has only to think of the work of Rostow, or even Robertson’s stages of globalisation. Social and scientific metaphors have become mixed in the “development” debate. A similar conflation occurs in the application of scientific knowledge (particularly psychological knowledge) to social situations; that is biological characteristics are given a social meaning. In the case of children they are, as has been seen, defined as immature, lacking rational thought and as needing to learn. They are in effect proto social

beings. This translates into a requirement that their development be secured. Following on from Piaget et al the mode of transition is clear, some form of structured learning process is needed, as a result of which children will become a social person prepared “for an active adult life in a free society” (Unofficial summary article 26 CRC)<sup>7</sup>. In fact, child development is part of social development “The key message of the 1990 World Conference on Education for All in Jomtien, Thailand, was that investing in children’s education is the single most effective way of achieving both accountable democratic governance and socio-economic development.” (Boyden 1994)<sup>8</sup>. In this interpretation learning is at one and the same time a natural and a social requirement. A natural and social requirement reinforced by social rules such as compulsory education provisions.

As a result of learning being given this positive meaning a correspondingly negative value is placed on child work. If learning is beneficial and natural for children, working is unnatural and harmful because it is not generally seen as a learning activity “Street children work most, learn least” (ILO 1996a: 9). In addition it can obstruct, to a greater or lesser extent, opportunities for learning. “...surveys reveal a positive

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“Children deserve, need and have the right to a nurturing and stimulating environment that fosters growth and development in all areas of their lives. Key among these is education which includes not only access to school, but quality basic learning.” (UNICEF 1997a: 2).

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But see also her implied criticism of this perspective (1990: 195).



correlation between child work and poverty ... and school non attendance” (ILO 1996a). In contrast education in various forms is often seen as a means of reducing or eliminating child labour (Boyden 1994:5)<sup>9</sup>. This construction of child work, which is common to the welfarist approach of the ILO Conventions and the child rights discourse of the CRC, acts to delegitimise child access to work. Putting on one side judgements as to whether this is a good or a bad thing, this construction remains an effect of power in Foucault’s terms: “Basically power is less a confrontation between two adversaries or the linking of one to the other than a question of government...To govern in this sense, is to structure the possible field of action of others” (1982: 221). The field of action in this case is the involvement of children, as social actors, in the world of economic activity, together with any adults associated with this involvement. Government in this sense is not achieved through use of direct state coercion (although Foucault’s analysis does not rule out this possibility) rather it is derived from the structuring of expectations, by discourses such as child psychology which are channelled through international policy statements.

Not only are children’s activities structured by these discourses, they are also redefined. Prout and James point out that work in the school room is not recognised as *work* at all but as something different because it is done by children (1990: 227). This approach, with an added twist, is also applied to the activities of working

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See also ILO1997a: paragraph 78; and ILO and UNICEF 1997b: paragraphs 29 and 47.

children. International policy statements demonstrate how the redefinition works.

Not all child work is treated in international discourse as either harmful or exploitative. For example, from the earliest ILO Conventions onwards child work associated with learning has had a protected status (see ILO Conventions 5, 7 and 15) and ILO 138 is no exception. Work done “for general, vocational or technical institutions” in schools or other institutions is exempted by article 6 from the provisions of ILO 138. The same approach is adopted by UNICEF for the Oslo Conference: “There is evidence that moderate work can itself be a positive educational experience which boosts self-esteem and inculcates responsibility, two critical ingredients to academic achievement, and may even result in improved school experience.” (1997a: 10 citing Glasmovitch). Equally work done by children to earn pocket money to buy consumer durables is contrasted favourably with other occupations (ILO 1997a: paragraph 7; ILO 1997d: 1). The common denominator amongst these exceptions is that the activities concerned are not seen as economic. One involves pocket money, the others are treated as learning experiences; in other words, as with work in the school room, they cannot involve work. The added twist is that, unlike work done in school, vocational work and “working for pocket money” would almost certainly be treated as economic activities if done by adults, especially adult males.

The effect of this redefinition is to deny that children are economic actors, rather they are treated as learners or dabblers in the economic sphere. As a result they cannot

expect support if they do work for a living. On the contrary, as the first part of this chapter shows, depending on their occupation children are treated as being exploited and are therefore constructed as victims. As victims they are entitled to protection *from* work rather than protection *in* work, with the consequence that they may be preferred as workers in the informal sector<sup>10</sup>. The effects of this redefinition has important consequences for the lives of Sri Lankan domestic servants, as will be seen below.

Another approach to defining acceptable child work is to be found in the 1986 UNICEF report. The report defines child work by geographical position and connection with the family. Three main categories of work are identified: work within the family; work outside the home but still home based; and work completely outside the family. Work within the family is not presented as ideal, children may be put at risk by doing too much agricultural work, for instance, but such work can still be seen as an apprenticeship. In contrast, the further a child goes from the family environment, the more she or he is considered to be at risk. Influenced by UNICEF's experience with "street children", the report suggests that children who only spend part of their time with their family may also be involved in work that is "not always lawful and morally appropriate" (UNICEF 1986a: 14). Children without family contact at all "encounter a much higher level of risk and less access to services and

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"In peak periods, children are a valuable reserve of casual labour, while in slack periods they can be laid off more easily than adults" (ILO 1997a: paragraph 36).

support” (1986a: 7). Child domestic servants in urban areas are placed by UNICEF in this, most risky category.

The use of family ties to define child work represents another conflation of the social and biological values associated with children. If children are different from adults with specific needs and interests, those needs can best be met in a family environment. This is the main premise of the work of Goldstein Freud and Solnit. “...where the family exerts its influence benevolently, with consideration, understanding and compassion for each individual child member, the balanced opportunities for a unique development and for social adaptation are maximized” (1973: 16). The purpose of their analysis in *Beyond the Best Interests of the Child* is to ensure that the judicial process maintains or secures children in such placements.

Goldstein et al understand the family in psychological terms, as a place of continuity and security in which the child’s mental and emotional development are secured by “psychological” parents. Psychological parents do not necessarily need to be a child’s biological parents, although Bowlby’s work has been used to support this position (Fox-Harding 1991: 117). It is this stress on the importance of psychological parenting that leads the family to be seen as a positive environment for children.

Following the analysis of Goldstein et al and Bowlby, the family also becomes significant in the process of social adaptation. As already seen this is precisely the position taken in article 5 of the CRC. Similar ideas can be found in other

psychological texts. Ainsworth, Bell and Stainton (1974) for instance see the parent child relationship in explicitly biological and evolutionary terms “...species characteristic behaviour is adapted to some significant aspect of the environment in which the species evolved, and... social behaviours are adapted to reciprocal behaviours of conspecifics.” They continue “In this vein it is reasonable to hypothesise that... unresponsive mothers may be viewed as the product of developmental anomalies and likely themselves to foster anomalous development in their infants.” (1974: 32). It is obviously important for parents to get their interaction right, suggesting that it is not only children’s but also adults’ activities which are constrained by the discourse on children. It is here that psychological arguments touch upon the debate about the role of family in society.

One way into the question of the role of the family and constraints on adults activities is the concept of a division between public and private spheres of action. As was mentioned above, this is a distinction which permeates the CRC, and is expressed in the line that the Working Group attempted to draw between family (private) and state (public) responsibilities for children.

The difficulty of drawing a line between family and state responsibilities is the outcome of tensions inherent in the public/ private dichotomy. As far as possible intervention should be avoided, this after all is one of the “value preferences” put forward by Goldstein, Freud and Solnit (1973: 7). At the same time external intervention may be necessary, and appropriate thresholds need to be identified, with

a balance being struck between interference and protection. This is a balance which the Working Group apparently felt had been achieved in the final draft.

It is a balance that has been challenged by critical theorists such as Freeman. He refers to the value preference of Goldstein et al, which they suggest accords with their “firm belief as citizens in individual freedom and dignity”, and asks in response “‘whose freedom?’ and ‘what dignity?’” (1985: 169). What is happening, Freeman suggests, is a process in which the public defines the private through the medium of law. The “law refuses to interfere in ongoing family relationships”. The law “stops short”, as in the case of parental responsibilities, when it defines what those responsibilities are, but does not intervene except in the event of a total breakdown. Freeman suggests that the debate about how far there should be intervention or otherwise into the family is a “mystification” by the state; a mystification which obscures the power relationships within the family, and the extent to which non intervention reinforces existing power relations. The answer to his rhetorical questions “whose freedom?”, “whose dignity?” is, he argues, the freedom and dignity of men as opposed to women, and adults opposed to children (Freeman 1985).

One effect of this mystifying discourse, as Freeman suggests, is that children are notionally placed in an informal, unregulated environment. This lack of regulation is significant when the situation of child servants is considered. The arguments against child service, expressed at Amsterdam and Oslo (see ILO 1997a: paragraph 12; and ILO and UNICEF 1997b: paragraph 15), include concerns that it is work that is

unregulated, or that cannot be regulated (an argument also made as far back as 1935 in Sri Lanka, as we shall see). It could equally be suggested though, that the problem is not simply that the work is difficult to regulate. Rather there is a reluctance to regulate child placements in other families, a reluctance reinforced by the notion that the family is a private sphere, and should be protected as far as possible from external interference. In other words the public/private dichotomy helps to construct responses to child service. This is one effect of the public/ private dichotomy to which Freeman would probably not object (see discussion on child rights below).

Freeman's analysis of the public/ private dichotomy is important in that it exposes the way in which it is a social fiction rather social fact reflected in legal discourse. But, as Rose and Collier argue, this analysis treats "the law" as a homogenous instrument of a homogenous state (Rose 1987; Collier 1995). It does not capture the way other discourses combine with a heterogenous notion of law, to construct both child and family. It is here that Donzelot's analysis in "The Policing of Families" has been influential (Donzelot 1980).

In "The Policing of Families" Donzelot adopts a genealogical approach, "a history of the social surface" (1980: 7) to examine the family in France from the eighteenth century onwards. He identifies two themes in the debate about the family which were significant from the beginning of this period: the waste of lives arising from the treatment of the children of the poor, which he describes as a problem of social economy; and concern about the health and education of children of richer families,

which he labels a problem of the economy of the body. Both involve the idea of a waste of social resources.

These concerns, he suggests, translated into reliance on the bourgeois family (particularly the mother) to support the health of the family, under supervision, “the privileged alliance between doctor and mother”...in which “the doctor prescribes, the mother executes”(1980: 18). One effect of this development was the exclusion of servants and unregulated outsiders from interference in child development. The child was placed in a protected space inside the family in which he [sic] could operate without constraint and free from malign influence.

Donzelot suggests that this bourgeois notion of family was extended to the working classes as the nineteenth century progressed. Women’s domestic labour was substituted for their dowry and the onus was on working class wives to create an interior domain attractive to their husbands and a safe, hygienic and controlled environment for their children. Among both the working class and the bourgeoisie, families became dominated by the discourses of medicine and hygiene.

In this analysis the family is treated as a social construct, the “moving resultant” of intersecting socio political discourses (1980: xxv). It is a construction of the family which is both “queen and prisoner” (1980: 7) of society. An ideal which structures society by providing its “fundamental group” (CRC preamble); and an ideal which is structured by society, as a space in which parents provide “appropriate direction and



guidance” for children (CRC article 5).

In this second version of the family ideal, the family can be seen not as a symbol for society, its fundamental group, but as a vehicle for securing social economy and social conformity. It is this vision of the family ideal which is important when discussing working children. There were and are families (mothers?) who fail to conform to this notion of family, who produce children who fail to conform to the norms of childhood. Children such as child domestic servants who are precisely at risk because they invert the family ideal. Not only do they work, but they work in the protected space of the family, for adults who have no apparent responsibility for socialisation or education. It is because child servants fall outside these norms they are vulnerable to being categorised as being at “high risk” (UNICEF 1986a) or in “exceptionally difficult circumstances” (CRC).

Donzelot provides an account of the way children at risk can be constructed through subjection to what he calls “the tutelary complex”. It is an account which has a particular relevance for my analysis of Sri Lankan government policies towards child servants, which tend to rely on the juvenile court for their implementation (see Chapters 5 and 6).

The tutelary complex, according to Donzelot, is constituted by the interaction of judicial and normalising agencies (the social work, probation, medical and psychological services) with their nexus in the juvenile court. He interprets the

operation of this type of court as a reorientation of the judicial process in which children are administered rather than punished. This transition, in which many of the symbolic trappings of justice are eroded, permits the court to deal with all groups of “irregular” children, both the risky and at risk.

Within the juvenile court setting, the focus shifts from isolated events (the offence, the act of neglect), to the whole situation of child and family. This focus is supplied by information derived from social inquiry and psychological analysis. Social inquiry involves investigation of family background and circumstances; psychological analysis assesses the state of the child’s character and degree of social educability (1980: 133). The child and family are interpreted, and it is an interpretation enforced through the power of the court (1980: 149). The juvenile magistrate becomes “the visible simulacrum” through which social and psychological expectations are imposed upon children and their families (1980: 150). The juvenile court becomes a physical location in which the discourses of childhood converge.

This convergence of these discourses, as I have suggested, produces a normalised image of children and childhood, which has been applied to child domestic servants. Children are defined as different from adults, and this definition permits the attribution of specific qualities to them. One of the most significant qualities of children is that they need to learn. They need to learn cognitive and social skills. Two social institutions are identified in the discourse as providing the optimum support for children in learning these skills, the school and the family. Working children do not

attend school, and child servants are treated as working children. But in addition, they are children who do not have contact with their biological and psychological parents, so that they are inhibited in their ability to learn the social and emotional skills which it is the responsibility of the parents to transmit. Child servants then do not experience a normal childhood, they are constructed as abnormal. In the same way, parents who fail in their responsibilities towards their children are also constructed as abnormal.

One of the effects of this interpretation of child servants and their parents according to the image of the dominant norms, is to make them vulnerable to external intervention intended to secure conformity. As Donzelot suggests state law is frequently used to facilitate the imposition of conformity to the norms of child psychology and child development. Unlike Donzelot though, I would suggest that the legal discourse is not simply a facilitative framework applying the norms of childhood. On the contrary the law (state law, international law) is itself structured by the same distinction which informs psychology and child development: the distinction between children and adults. The law in applying this distinction to children does more than facilitate other discourses, it is, as I suggested in Chapter 1, active in the process of interpreting children. It is the role of child rights in interpreting children which I will deal with in the next section.

### **Working Children and Child Rights.**

Thomas Hammarberg, in an article published in 1990, sets out some reasons why a

new CRC was necessary:

“Why make a distinction between minors and others? Were not children as well covered by the existing human rights norms? Would children really benefit from being singled out in a separate instrument? The main argument for a separate international human rights law for children was the reality of reports from all over the world indicating that children indeed needed special rights because of their vulnerability.” (Hammarberg 1990: 99)

Once again, as in the discourses of child psychology and child development, children are seen as a distinctive group, this time with specific rights, different from those of adults, which need to be supported. Of the distinctive features of childhood identified by child psychology and child development, the cognitive capacity of the child, and its changing nature, play a central role in the understanding of children as expressed in the discussion of child rights. Both the type of rights attributed to children, and the discourse of child rights itself, reflect the influence of these ideas.

An obvious example of this influence in international policies is the establishment of a right to education by the CRC. This provision translates the natural (cognitive) and social (national investment) requirement that children learn, into one legally enforceable by and against states.

The right to education as articulated in international law has specific, age related, characteristics, created by the same opposition between employment and education mentioned above, in connection with the CRC. The connection between work and school is also made by the provisions of ILO No 138. Article 2 establishes a minimum age of employment in the following terms: "... not less than the age of completion of compulsory schooling and, in any case, ...not less than 15 years" (or 14 years in some circumstances). This formulation does two things: it creates an expectation that children will attend school until they turn 15 (or 14) because they are not permitted to work, and it establishes an absolute minimum age for full employment. At the same time article 7 provides that children may be able to undertake "light work" between the ages of 13 and 15, so long as it does not interfere with their education. Another set of age related criteria is introduced by article 3, which restricts access to various types of occupations, those "likely to jeopardise the health, safety or morals of young persons" for children aged between 16 and 18 years old, the age frequently set as the legal boundary between child and adulthood.

The combined effect of these articles is to create an age, or series of ages, below which children have the right to education (and not work); above these ages children may have the right to work (and not education) attributed to adults by ICESCR (article 6). Children are permitted a staggered entry into the adult world of work. This approach marks the existence of an invariable, but also indeterminate distinction between adults and children based on the understanding that children have a cognitive capacity which needs to be supported through education. The series of ages identified

as boundaries for access to employment, reflects Piagetian type ideas that childhood capacity is an evolving one, which reaches different stages at different ages. As a result children are made the subjects of rules which are at one and the same time inflexible and flexible. The inflexibility is illustrated by the fact that no exceptions can be made for a child under a certain age (say 13 years and 11 months) to engage in an activity (say full time work), although once that child reaches 14 years old (only one month later) he or she could be fully employed. Nonetheless the rules are also flexible in that legislators, policy makers, adults, can revise them at any time and impose new age limits.

It is acknowledged by some child rights activists that for many children, whatever their age, work is not a choice but a necessity (UNICEF 1997a: 14). However even if it were a choice, children under a certain age are not permitted to choose to work. The choice is made for them by the age based system created by ILO Conventions and international policies influenced by these conventions and the CRC. Again the child (under a certain age) is excluded from choice in the question of education, as is his or her family, by the continuing emphasis on compulsory education provision. Age, capacity and autonomy are intimately linked in this approach to working children and their rights.

It is not simply the content of rights which reveal a preoccupation with age, capacity and choice. The structure of the CRC also reflects these ideas. Education is one of a series of child specific rights articulated by the CRC. Hammarberg categorises them

into three types of rights, the “three P’s: provision, protection and participation.”(1990: 100), and other authors and activists have adopted this schema (for instance Cooray 1996). Although contained within the same document, the concepts of child protection and child participation, and the associated rights, represent contrasting positions within the rights discourse. Essentially the debate is between those who, taking into account child vulnerability, try to involve both parents and state in a project to protect the welfare of children by reference to a framework of rights; and those who try to empower children through the attribution to them, to a greater or lesser extent, of the capacity to exercise rights. As Franklin (see below) points out this resolves itself into a debate about the extent of child competence (1995:11).

To some extent a balance is struck in the CRC between these two perspectives. This applies to both the nature of the rights allocated, for instance the right to access of information as well as to education (articles 12 and 28), and also to the way decisions are to be made about the exercise of such rights.

Articles 3, 5, 12 and 18 together establish a decision making framework. It is anticipated that both adults (carers) and some children should have input into the way child rights can be exercised. Article 5 states that carers should “provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of rights...”, while article 12 demands “the views of the child” be “given due weight in accordance with the age and maturity of the

child”. The combination of these two articles suggests that the potential exists to curtail the protectionist urges recognised by article 5 through permitting children, or at least older children, to exercise rights on their own account.

At the same time a requirement is placed upon parents and guardians, and to lesser extent the state, by articles 18 and 3, that in all child related activities the best interests of the child should be the “basic” (adult carers) or “a primary” (state officials) concern. Best interests is an “indeterminate” concept which has protectionist overtones, as many would accept (see Campbell 1992: 7; Freeman cited by Goonesekere 1993c: 124; Goonesekere 1994: 118;). Commentators such as Goonesekere argue that best interests can, and should, be interpreted as taking into account all the rights that children are granted by the CRC, thus compensating the protectionist effect by stressing participatory rights (Goonesekere 1994; Wolf 1992). However the very indeterminacy of “best interests” leaves it open to a variety of interpretations, through which adult competency can be substituted for perceived child incompetency; and adult interests can be substituted for, or even confused with, those of the child<sup>11</sup>.

Child competence, autonomy and choice form an important set of ideas which have influenced the structure of the CRC. They also form a set of ideas which relates to the crucial question for child rights that I mentioned in Chapter 1: how can rights be

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See discussion by McGoldrick of article 3 (1991).



identified and attributed to children?

Of course not all commentators do address this question. Some, in discussing child rights, ignore it all together. This is true, for example, of the group of papers published by the Human Rights Quarterly in 1990 following an international symposium held in advance of the promulgation of the CRC in 1989 (Gilkerson 1990: 94). These may not be representative of the full range of the authors' views, they may address the question elsewhere, but it is still surprising that of seven papers published none address the question of how children have rights, nor of why they have the rights they do. In contrast other writers tend to suggest that while there was a question to be debated, that it has now been settled in terms of the CRC. That there is now a consensus on the how and why of child rights, and they write on the basis of this consensus (Cohen 1992; Goonesekere 1994). I will address the nature and extent of the consensus on child rights, specifically working children's rights, in the last part of this chapter. At this point though I would suggest that the how and why of child rights remains an important issue that I want to discuss for three reasons. Firstly, it is an issue that continues to be debated amongst theorists, suggesting that there is in fact no *theoretical* consensus on child rights (a statement with which I think all the disputants could agree, see for example Lucy (1990). Secondly, underlying the debate is a concern with the nature and extent of child capacity, which tends to constrain the various theories of child rights and their potential for translation into the practical, unenlightened world. Finally, child rights, whatever their good or bad points, can have a tremendous influence on the daily lives of children.

The question of identification and attribution of child rights arises whether a positive or moral based approach to rights is adopted. It is a question that tends to be discussed in terms of will versus interest theories of rights, the elements of which can be sketched in the following terms. The will theory of rights, in its basic form at least, approaches rights from an overtly rational perspective, in terms of competent actors who chose or not to enforce their individual rights. The rights concerned are usually rights associated with capacity and individuality, “project rights” (Wolfson 1992 citing Benn). This analysis causes immediate problems for those theorists who want to accommodate children within the discourse. Children are, as we have seen, frequently not recognised as competent and in addition, they have (according to Hammarberg amongst many others) significantly different interests to adults. Do they qualify as rights holders at all and if so what are their rights? One way to address these issues is to reject a will theory of rights and express rights in terms of interests to be protected, interests that can extend beyond the rationally based interests usually associated with “project rights”, and can as a result prove difficult to identify. Various analyses have been developed, using aspects of will and interests approaches to rights in order to accommodate children within schema of rights, and I will discuss three of them below, together with their implications for child workers. In each case the authors selected, Franklin, Freeman and Campbell take a distinct position in the ongoing debate.

Franklin provides a radical answer to the question of rights (see for example Franklin 1986 and 1995). His response is to subvert the capacity/ protection and the will/

interests dichotomies by arguing that children are equally as capable as adults. A concise summary of the “libertarian” position with which he associates himself is set out in “The case for children’s rights: a progress report” (Franklin 1995) from which I quoted earlier:

“...objections to children’s rights can be met either positively or negatively; i.e., by asserting that children do possess the qualities which critics assert they lack, or by conceding that if children do lack the skills and qualities necessary for participating in decision-making, they lack them to no greater degree than adults who are not, on this ground, disqualified from participation.” (1995:10).

Following Franklin’s argument children do not need to have their interests protected, they are, in his terms, fully competent social actors who can exercise or waive their rights in the same way as adults. As such they should be accorded the full range of rights attributed to adults, which in the case of working children would include the right to work, and the right to chose whether to attend school or not. His approach also neatly addresses the problem of subjective valuations in child rights. If it is accepted that both children and adults possess adequate competence to exercise rights, then there is no need for some form of competency test to be devised to sort out the right holder who is capable of exercising their rights, from one who is incapable and reliant on others to exercise rights on their behalf. Any such test (for example the concept of future competency, see Freeman below) invites subjective interventions, which can

be used to exclude not only children, but also adults of varying skills and qualities (1995:12). Equally as important, the dissolution of the distinction between adults and children demanded by Franklin's analysis, results in the rejection of the series of age related boundaries which are imposed upon working children. Children would no longer be prohibited from working at 13 years and 11 months but permitted to work at 14 years old, nor would they be vulnerable to the age of employment or education being altered without reference to them.

Franklin's analysis establishes an effective campaigning position, but it is also a problematic position for at least two reasons. Firstly, he does not adequately explain how children may be able to exercise their rights within the current (or any future) judicial arrangement, beyond making suggestions to support child participation in existing decision making processes (1995:14). In addition, his analysis exists outside the mainstream of international thinking on children, which is premised as we have seen, on the basic distinction between children and adults, and which seeks not only to empower but also to protect children. However it is precisely this discourse that Franklin seeks to address and rearrange but without fundamentally changing the existing structures, like law, in which child policy is implemented.

Like Franklin, Freeman is associated with the liberationist wing of the child rights discourse. Like Franklin he wants to escape from the paternalism of the child welfare approach and in the process to empower children. He is particularly critical of the child welfare model, adopting an approach that is reminiscent of Donzelot's analysis.

He suggests, in his 1983 book “The Rights and Wrongs of Children”, that welfare law is structured by psychological and medical discourses, with the juvenile court providing a forum for the prescriptions of welfare experts. The result is a loss of “due process” and form of surveillance by the back door, established on the basis of a “philosophy which puts needs before rights and treatment before punishment” (1983:69).

Freeman’s response to this form of welfarism is to reassert a strong rights based approach to the law relating to children, and in so doing he parts company with Donzelot’s analysis. His response can also be distinguished from that of Franklin because he stays within the mainstream discourse of rights, maintaining a distinction between the capacity of children and adults, and he bases his arguments on a version of the will theory of rights.

Freeman takes a generally Dworkinesque perspective in his attempt both to move beyond the paternalism of child welfare, and to sidestep the issue of child competency created by a will based approach to rights. His solution is to characterise children as potentially autonomous or having the “capacity” for autonomy. However the insertion of children into the rights debate by means of an idea of future competency is problematic. Implicit in this characterisation is the acceptance that children are not, as a general rule, competent now. If children are not competent all the time, then there must be occasions upon which control of their rights will be taken by a third (adult) party, which invites the very paternalism that Freeman is seeking to avoid, as Franklin

would recognise.

Freeman also recognises that there is a problem:

“Parties to a hypothetical social contract would know that some human beings are less capable than others... They would also bear in mind how the actions of those with limited autonomy might thwart their autonomy in future time when their capacities were no longer as limited.

These considerations would lead to an acceptance of interventions in peoples' lives to protect them against irrational actions " (1994: 38).

Having set up the problem Freeman goes on to state:

“But what is to be regarded as 'irrational' must be strictly confined. Subjective values of the would be protector must not intrude.” (1994: 38).

How is this to be avoided? Freeman purports to do so by establishing a test of "irrationality" which would " justify intervention only to the extent necessary to obviate the immediate harm, or to develop the capacities of rational choice by which the individual may have a reasonable chance of avoiding harms" (1994: 38)

Although Freeman clearly establishes a concrete test by which to judge intervention,

it is questionable whether he succeeds in avoiding "subjective values", and therefore paternalism and disempowerment. Who will decide what is "harm", what is reasonable, and precisely when intervention on the basis of harm is justified? Freemans's response may be that decisions as to harm will be made through "due process" in the law courts (which is of course debateable), but the question remains what discourses will inform those decisions.

This question is particularly relevant to the position of working children in Freeman's analysis. They are already placed by him into the category of children whose situation justifies intervention (1994: 39) on the basis that employment and not education is contrary to their development. In other words Freeman constructs child workers through the discourse of child development and psychology. On the basis of this construction employment is treated as some form of "irrational" act. As a result working children are firmly placed back in a residual form of paternalism, as children who are to be protected. They continue to be governed by the very "psy" ideas that Freeman seeks to avoid, through the implementation of child protection policies, which in practice are usually implemented through governmental administrative agencies and non governmental bodies, rather than the courts. In addition, although his "irrationality" test may lead to more flexible age related boundaries being established by employment law, the fact that it will have to be applied on a case by case basis, by officials including judges, may actually increase the unpredictability of paternalist intervention.

Freeman's argument involves an appeal to a moral system in which rights originate, based, as is apparent from his discussion of a hypothetical social contract, on a type of Rawlsian revelation. It is this leads him to assert that "The deep structure of the rights thesis is equality and autonomy"(1994: 33). Campbell, who takes an interest oriented approach to child rights, also invokes a moral basis of rights by adopting a "moral rights style" (1992: 8) as a way of recognising what interests children have.

"Roughly, moral rights may be regarded as those interests which are thought to be of such significance to the life of the human individual that they ought to be given priority in the organisation of societal existence wherever possible."

"...moral rights may be seen as expressing the grounds for having such positive rights such as the intrinsic importance of the equal protection of certain fundamental human interests." (1992: 10)

Campbell's argument, as expressed above, is rather circular: moral rights are interests that have been identified as important, and such interests are moral rights. His purpose in using a moral rights style (as opposed to moral rights per se) is, he says, to avoid the natural law positivism debate and to avoid a commitment to "...a questionable ontology of values" (1992: 8). He similarly rejects the value system of will based theories of rights, since in his view they place far too much emphasis on the rational qualities of human beings, which as suggested above causes problems for child rights:



“...the exclusive stress on self sufficiency and autonomy which is standardly deployed to call into question the attribution of rights to children, is a woefully partial expression of why people count and why we matter to each other.” (1992: 3).

In contrast an interest based analysis of rights uses the concept of interests to expand beyond ideas of rationality and capacity, to capture a more holistic understanding of human existence:

“...in rejecting the power [will] theory we have already broadened the base for rights justifications from the narrow confine of those interests which may be characterised as promoting choice and autonomy to take in interests in general...” (1992: 16).

Campbell argues that will based theory of rights not only unwarrantedly constrains ideas of child rights, but that it also may be used to exclude children, and others who do not possess rational capacities, from the possession of rights (1992: 17), which is much the same concern as expressed by Franklin. He admits that an interest theory of rights “...leaves us with a very open ended basis for determining which interests are to serve as the basis of rights. In the end this may be a matter of straight substantive moral choice...” (1992: 16), but he also goes on to develop an idea of the rights children may have, based on the interests that they possess.

In his analysis Campbell identifies four categories of interest based child rights: child

as future adult; child as person; child as juvenile and child as child. This categorisation involves a stress on recognising the interests of children as distinct from adults, those interests that relate to the present status of the child, and those which are based on the child in relation to the adult.

Campbell suggests that the predominance of will based theory of rights has meant that the interests of children as future adults (see for instance Freeman above) tend to be treated as the distinctive rights of the child (1992: 20). He agrees that this type of right can be useful for children, but not exhaustively so, and that such rights have a tendency to exclude the significance of childhood experiences. Another type of right is one derived from the fact that a child is a person *now*, a point he suggests is “sometimes neglected”. As a result children should have many of the rights accorded to adults under existing declarations and conventions although not all of them are relevant to the child’s present interests. In adding this caveat, Campbell rejects Franklin’s position that children should have the same rights as adults. On the contrary children need distinctive rights and not to be perceived as “adults who are erroneously being treated as children.” (1992: 18). Such distinctive rights include a recognition that all but very young children have the capacity for autonomy interests, and all children, including the very young children equally have interests in being a “real” child.(1992: 21).

In stressing the present importance of rights to children Campbell is attacking the same subjective problems of rights raised by Franklin and Freeman. It is

methodologically dubious he says, to instantiate rights on the basis that the adult is now glad that certain decisions were made for him or her in childhood, because “the adult that retrospects is the adult who is produced by a particular sort of education.” (1992: 21). Instead, Campbell’s emphasis on the rights of children in a present childhood, is intended to focus on what children are interested in now. It can also provide a way of interpreting the interests of children under the CRC, where for example the terms of article 32 can be argued in different ways depending on whether a future or a present based approach is taken (1992: 22).

In presenting this analysis Campbell does something that Franklin and Freeman do not: he challenges the rational basis of rights. This is significant because it breaks through the rational stereotype which measures children against adults and ties rights to apparent or future capacity. Campbell in contrast provides a perspective in which children could be allowed to make the choice (or undergo the necessity) of working on the basis of their current situation. It is almost certainly though not Campbell’s intention to permit children such free rein. In a later article he argues that it is important to recognise that rights are not necessarily tied to choice within an interest theory of rights (he cites MacCormick) and that children may have rights but without the choice of election (Campbell 1994: 260).

In addition it is not clear how far he gets beyond a commitment to a “questionable ontology of values” through his moral rights style. The interests identified through his circular argument (see above) are still likely to be interests that appeal to adults rather

than to children and which stress capacity and rationality. This is implicit in his continuing acceptance of future oriented rights, and in the type of rights he accords to children under “adult” conventions. Do children, he asks, actually have a present interest in the right to work? In making this sort of point Campbell is still referring to a developmentally based understanding of children, and he would probably not disassociate himself from this perspective since his schema of rights categories is dependent on a developmental approach to childhood<sup>12</sup>. As a result I would suggest his argument does seem to let rationality in by the backdoor, precisely because as argued above, underlying developmentalism is a rationally based system of values.

Campbell is something of a pragmatist, as can be seen from his discussion of the British Human Rights Act 1998, where he argues that the epistemological and ontological deficits of rights need to be recognised and moved beyond (1999: 14). Equally, his analysis of child rights may point towards a different way of seeing children, one that goes beyond an express focus on rationality, although he does not develop his ideas to challenge the relationship of rationality to rights. Indeed, what is apparent from the above discussion is that the language of rights remains, overtly or covertly, the language of capacity and (adult) autonomy, which constrains what can be said about children and establishes specific limits to the empowerment of children through rights. This is the negative legal subjectivity attributed to children

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This is a point made by Purdy in their tense exchange of articles in *The International Journal of Children's Rights* 1994 Vol 2.

that I referred to in Chapter 1.

We have come to what I suggested was the nub of the problem in Chapter 1: how do rights address power? Do they challenge constructs which disempower? Roche, as I mentioned, argues that they do, that the language of rights “carries within it the possibility of the new and the discordant” (1995:281). Specifically Roche argues that rights promote ideas of children as participants, and as individuals with interests distinct from that of society. As a result of child rights “participation in the widest sense must be part of the child care, child protection agenda”, although the right of participation still has to be balanced with the need for protection (1995: 286). Once again though the definition of children as rational (participants) or irrational (requiring protection) is confirmed in this analysis. Only the boundary between rationality and irrationality is challenged, as in the Gillick case in the United Kingdom, which established that “sufficient understanding and intelligence” rather than age alone, should be the determining factor in allowing children to make decisions about medical treatment (Lord Scarman, *Gillick v West Norfolk and Wisbech AHA* 1986 AC 112 at 186). There is nothing, I would suggest, that is new or discordant in this development. Children below 18 have long been seen to have capacity, and in the case of the criminal law this has not always worked to their advantage. Gillick (and the cases which followed) represent a continuation of the debate about child capacity, rather than a new way of thinking about children.

Baxi accepts that children are constructed by rights, but argues that the constructions

available are more empowering than the “primordial” identities that they replace (1998: 147). Primordial identities here refer to caste and gender identities. By invoking rights, these identities are replaced by an identification of children as different, irrational. Such identities may also be considered as primordial, they are certainly treated as “natural”. No doubt rights are more empowering than constructs which treat girl children as valueless. However, this brings us to the critical point in the best we have/ good enough argument about rights. Rights replace primordial constructs, (best we have) but they substitute one set of power relations for another. As I have argued in this chapter, rights impose an essentialising identity, which as Baxi acknowledges creates “new sites of injury” (1998: 147). It is this process that leads me to ask, are they good enough?

One response, Burman’s response, is to argue that rights can be made more flexible, that the sites of injury can be ameliorated. It will be remembered that Burman appreciated that particular “northern” norms of childhood tend to be propagated through the combination of legal and psychological discourses in child rights. She proposed to address this tendency by the juxtaposition of local concepts of childhood with the moral framework of rights. In other words she attempts to introduce complexity into the normative framework of child rights. I asked at the end of Chapter 1 whether this was possible. Whether rights could be sufficiently flexible to accommodate alternative accounts of children and their place in society. I think my answer must be “no”. As my lengthy discussion in this chapter suggests, rights are conditioned by a particular view of social organisation. It is a view in which children

are defined in terms of their capacity. Whether an interests or will based approach is adopted children are still treated as in need of education and protection from work, needs supported by rights, which children themselves find difficult to access because they are less rational than adults. It is a view of society underpinned by an idea of rationality. Further it is a view of society translated into concrete terms by the CRC. The CRC is not simply a broad moral framework, it is a prescriptive model of childhood, which, for instance, demands that all children be educated at least to primary level (article 28), and defines the content of that education (article 29). As Abernethie argues it has become “our late twentieth century truth, ... that children should not be, for example, bonded labourers...” (Abernethie 1998: 111).

### **Working the Consensus.**

I quoted from Abernethie’s article in the last paragraph. She develops a Foucauldian analysis of the concept of child work, treating it as a social construct and charting changes in meaning in Europe and the United States of America. Further she suggests it is a concept that, in interaction with the discourse of rights, has produced “our late twentieth century truth”: children should not work. While I would agree with much of what Abernethie says, I find it interesting that she seems to be treating “our truth” as a global truth. This segue occurs in her comments on globalisation (1998: 111-112). She suggests that concerns about child work have intensified as globalisation, particularly the globalisation of communication media, has occurred. There is now a “global” debate about child work, a debate framed by the truth produced by human

rights.

We are back with the idea of interaction on a global scale. Abernethie refers to the “global village” and to Giddens’s suggestion that the world has become “a single social system. She argues that “people are more and more coming to believe that they live in one world”, and in this coming together world, people are coming to think the same way about child workers. Or if not in the same way, at least within the same framework. This analysis ties in with Robertson’s idea of an “intensification of consciousness of the world as a whole” and of a general movement towards unicity.

An-na’im shares Robertson’s idea of convergence, anticipating (hoping?) that there will ultimately be a normative consensus that reflects the CRC. Burman, while recognising the disjunctive tendencies of international interaction, also argues for accommodation of local perspectives within the framework established by the CRC. Underlying all these arguments is an idea of consensus, an agreement on the nature and needs of children within the framework of our global truth. Rather than complexity, we get consensus.

A similar idea of consensus is to be found throughout the international discourse on child work. As the first section of this chapter suggests, it is generally agreed that child labour is a problem. In 1995 an ILO Report to the Governing Body (GB.264/ESP/1) identified a “renewed interest in international fora in the problems posed by child labour”. In 1997 at the two international conferences on child work



(mentioned in Chapter 1), among the many similar statements made, there was said to be a “growing awareness and concern about the problem” and a “growing resolve and commitment to end child labour.” (ILO 1997b and ILO and UNICEF 1997a). In 1999 Juan Somavia, the Director General of the ILO, reiterating the view of his predecessor that “child labour constitutes the single most important form of child exploitation and abuse in the world today...” also felt able to say that “fortunately world opinion has rallied to the cause...” as demonstrated by, for instance, the CRC (ILO 1999a; ILO 1997d).

Consensus was again the theme once the possibility of a new convention had been raised in 1995 (ILO 1995a). It was proposed that consideration should be given at the 1998 Conference to the adoption of new international standards banning “intolerable” forms of child labour (ILO 1995a: 23). In 1996 the ILO suggested that there was “a solid prospect” that the convention would be adopted and that it would have a “good chance of being ratified by a large number” of countries (ILO 1996b). To this end the focus was on the production of a concise and clear instrument in order to encourage ratification, since ILO No 138 had failed to secure the necessary support (ILO 1999c). Again the ILO identified the existence of “overwhelming support” for the convention during the drafting process and the existence of and the need to maintain a consensus was reiterated by the participants to the process (see ILO 1999c and 1999d). This support subsequently translated into a unanimous vote in favour of adoption of the convention, the Worst Forms of Child Labour Convention (ILO No 182, hereafter the WFC) at the Conference in June 1999 (ILO 1999e).

How does this consensus on child work and human rights operate? One way of considering this question is to look at the consultative provisions of the WFC. The concern of the WFC, as its name suggests, is to eliminate extreme forms of child work. In fact the forms specifically referred to by article 3 - the sale of children or their use in slavery, forced labour, armed conflict, prostitution and “illicit activities”- might not be considered as employment at all. Crucially, however, article 4 permits local (national) identification of types of work that are likely to harm health safety and morals, and against which immediate action should be taken. This identification process should involve consultation between the government and employers and workers organisations, and the principle of consultation is extended to “other concerned” groups for the design of action programmes under article 6. “Other groups” are specifically defined as including children and their families in paragraph 1 of Recommendation 190 which amplifies the WFC. Although limited and done grudgingly<sup>13</sup>, the extension of consultation beyond the exclusive tripartism of ILO 138 represents an important attempt to introduce local perspectives into the international framework on child work.

But the local perspectives recognised by the WFC operate within a fixed framework the basic principles of which reflect Abernethie’s truth: child work should be banned

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For instance the workers’ representative opposed the reference to other concerned groups in article 6 “because governments repressed Trade Unions and were more open to consulting with NGOs...” (ILO 1999d).

and education encouraged. Unions and employers organisations, representing two of the three “tripartite” elements of the ILO, are entitled to be consulted (governments are not obliged to follow the advice given) on the work be banned. In contrast non tripartite groups, including the children concerned, are only consulted in connection with developing programmes for combatting the problem of child work, rather than identifying whether it is a problem in the first place.

In other words national groups are constrained to think in terms of a “globalised” local perspective on childhood, a situation which reflects the idea of relativisation described by Robertson (see Chapter 1 above) and challenges Burman’s more interactive account of rights.

Of course international initiatives and instruments reflect an aspiration rather than a concrete reality. The idea of consensus legitimates this aspiration, but as Baxi points out “ The ‘fine print’ of reservations usually cancels out the ‘capital font’ of universality.” (1998: 153). What happens to consensus then, outside international fora and organisations? Is the child rights model of childhood gaining acceptance at a local level? Are many social actors framing their ideas about children in terms of this “global” model? Is there, in Geertz’s terms a convergence of views as well as of vocabulary (Geertz 1983: 221)?

## Chapter 3

### Historical Perspectives

#### Introduction.

Child labour is currently the focus of some concern in Sri Lanka: “Child labour problem is come and now everybody is talking about child labour” (interview with informant from Ministry of Labour and Vocational Training 26.6.1996). In particular the concern seems to be about child domestic service: “Child labour really, that all comes under ... domestic service only, I think that a problem only for domestic service” (interview 26.6.1996). In the next chapter I will look at current constructions of child domestic service in Sri Lanka, but here I want to ask, as I did in relation to the international discourse, where did these constructions come from? In considering this question I will develop a form of genealogical analysis of the Sri Lankan policy debate during the twentieth century, concentrating, as in the last chapter, on the legal discourse.

“Genealogy” is a term employed by Foucault. In his work, Foucault stresses the historical contingency of social constructs. For instance, in “Was ist Aufklärung?” (1984) he argues that we are “beings who are historically determined, to a certain extent, by the Enlightenment” (1984: 42). In recognising this determination

Foucault also proposes to challenge it. To do so he describes a form of critique that is “genealogical in design and archaeological in its method”. It is an approach that treats discourse as a historical development, and which is concerned to separate out from the contingencies that have made us what we are, other possibilities of being no longer what we are, that is to open up other possibilities. The focus is on the processes of normalisation in practical systems. In terms of child domestic service it can be used to ask how did domestic service come to be understood as it is, what was or is suppressed in its construction, as well as how children are talked about through ideas of domestic service.

Two interrelated themes help to structure this genealogical discussion. As in previous chapters, I pick up on ideas of interaction and exclusion, this time in conjunction with ideas of creation and re-creation.

Interaction and exclusion are important ideas in the legal pluralist debate. Pluralist analyses start from the position that law, as in rules which govern social organisation, come in a variety of forms, all of which are equally valid. The work of Geertz can be placed in this category. In “Local Knowledge” (1983) Geertz discusses types of “legal sensibility” in an attempt to capture and compare different cultural approaches to ideas of law. His argument is that different legal sensibilities (that is legal ontologies and their application) exist which structure ideas of law. Using three “resonant terms” from three legal traditions, *haaq*, *dharma*, and *adat*, Geertz argues that legal thought is not merely instrumental, but

also constitutive of practical reality, and that the various sensibilities must be approached and accommodated for legal discourse to be relevant and effective in context.

In pitching his argument at the level of ontology, I would suggest that Geertz escapes Tamanaha's criticism that legal pluralist analyses, which assert the equivalence of state and social norms, lose an appreciation of the way that state law acts to construct and control social reality (Tamanaha 1993). In Geertz's terms, western legal discourse could be seen as a rival sensibility which interacts with local sensibilities, and which may accommodate them, or if dissonant, exclude them. In any event, Tamanaha himself could be criticised for failing to acknowledge sufficiently the constructive effects of social discourses as a whole (discourses beyond "the law").

A second theme is ideas of creation and re-creation, in terms of legal category and law itself. Snyder (1987) identifies a process of creation of customary law in the colonial context; a process which ensures that custom conforms to dominant values. Woodman develops a similar analysis of the same process, in which customary norms are incorporated, perhaps even "devoured" during codification and application, and which in the process lose their identity and become re-created as elements of the state legal system (Woodman nd).

I suggest in this chapter that processes of creation, incorporation and exclusion can

be found in the development of legal policies in Sri Lanka. It seems that a state legal sensibility, reflecting what might be called metropolitan ideas (to acknowledge their colonial orientation), has tended to dominate, shaping and delegitimizing local ontologies of law as they relate to children. This is not to argue, as one nineteenth century legal commentator did (see below), that local ontologies have been “obliterated” in all or part of Sri Lanka. Rather it is to identify the strength of metropolitan norms in policy development, and a failure of accommodation, at a policy level, to the local context.

In addition I will suggest that two other metropolitan discourses, nationalism and modernisation, are also important in structuring child related policies. In the case of nationalism, it is possible to argue with Kapferer (see below) that local ontologies on national identity are significant in the policy debate. However it seems to be the case that the final policy configuration reflects the international image of child work and child service. I will begin my discussion of this configuration with a moment of creation.

### **The Creation of Kandyan Law.**

Kandy is a major regional centre in the highlands of Sri Lanka, the last part of the island to be colonised by the British in 1815. Subsequently “Kandyan law” became an aspect of the legal amalgam which is now recognised as the state law of Sri Lanka. It is not the only “indigenous” (Goonesekere 1987: 2) source of law. This

description could also be applied to laws attributed to the minority Hindu and Muslim communities, respectively the Tesawalamai and the Mohammedan Code. Two other non indigenous sources of law, Roman Dutch and English, complete the island's official legal universe.

In this section I have chosen to focus on Kandyan law, as opposed to the other sources of state law, for several reasons. Firstly it gives an opportunity to set out brief details of Sri Lanka's colonial past. Connected to this past, Kandyan law can be seen as a created customary law (in Snyder's terms) which has resonances in the regional characteristics of contemporary Sri Lanka. At the same time it is a pointer to the existence of alternative legal values which may continue to exist outside the state legal system. Finally, in its created form, Kandyan law contains a distinction between informal and formal (state legal) adoptions which has influenced the configuration of child servants on the island.

In 1927, during the period of transition to independence, the Sri Lankan government appointed a Kandyan Law Commission to inquire into the current state of Kandyan law (Sri Lankan Government 1927). Its subsequent report provides a history of the Kandyan law, a history which contains echoes of numerous creation myths. It is worth quoting at some length:

“The body of law known as Kandyan Law was till comparatively recent times contained in no written records. It was essentially a



customary law, and when it had to be administered there was, to quote Sir John D'Oyly 'nothing to guide the opinions of the sovereign, judge and chiefs, but tradition and living testimonies.'"

"In 1818 a request was communicated to the Board of Commissioners [responsible for judicial administration] by the Government in England asking for an account of the 'ancient institutions, customs, feelings and prejudices of the Kandyan people'. It was thereupon agreed by the Board that the members should each draw up a memorandum on different subjects and that these should be forwarded to the Government...The outcome of this all was Sir John D'Oyly's Sketch..., Sawers Memoranda and Notes... and Turnour's Statement"

"Reference might also be made to Armour's Grammar...and to the Niti Nighanduwa...Hayley in his book states that [the] account of the origin of the Niti Nighanduwa cannot be accepted...but he also states that...[its] merits...have not been sufficiently appreciated."

(Sri Lankan Government 1935d: 4, 7, 8).

Originally formless, Kandyan law was given "some definite shape" (Modder 1914: xi) by European commentators and experts, informed it is true by discussions with local chiefs (see for example D'Oyly (1975: 99), whose texts became the

fundamental scriptures of Kandyan law. The only contender for an indigenous commentator, the Niti Nighanduwa, was frequently mistrusted, as the quotation suggests. This was a shape which in the nineteenth century reflected the interests of the British administration at a time, when it was strengthening its control over the island and introducing a capitalist economy to Sri Lanka.

#### A. Creation of the “Kandyan.”

The maritime provinces of Sri Lanka had been under colonial influence for two centuries by the time that the Kandyan kingdom was ceded to the British in 1815. At the time there was little to distinguish the “Kandyan” from the majority of the inhabitants of the maritime provinces. What distinctions did exist related to the effects of European administration, including perhaps a Kandyan sensibility of having been a separate kingdom (de Silva 1981), rather than to fundamental ethnic, cultural or religious differences. However by the early twentieth century a distinct identity was being attributed to the “Kandyan”, and this was in part due to the effects of British legal policies which actively distinguished between the two parts of the island. In the maritime areas, on the assumption that “custom” was “obliterated”, Roman Dutch law was treated as the general state law and recognition of Sinhala law was limited (Goonesekere 1987: 3); at the same time Sinhala law was applied extensively in the erstwhile Kandyan kingdom<sup>1</sup>. As a

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“Kandyan” and “Kandy” are “pure British terms”, derived from the Sinhala for hill, and applied to the newly annexed territory (Jayasekera 1984:2).

result “Kandyan” law was identified as a discrete body of law and one applicable in a specific region, the Kandyan provinces.

Having created a region in which Sinhala/Kandyan law could operate, the colonial government and judiciary reformulated its status. This was achieved by reducing Kandyan law from a “territorial” to a “personal” law, applicable only to persons deemed to be “Kandyan”<sup>2</sup>. Gradually, precisely who was “Kandyan” was consolidated. Initially the category was relatively fluid, with low country Sinhalese being treated in practice as having been “kandyanised” if they lived in the region (at least until the judgements of *Williams v Robertson* 1886 8 SCC 36 and *Wijesinhe v Wijesinhe* 1891 9 SCC 199; see also Goonesekere 1987: 21.) By the early twentieth century decisions in the supreme court held that “Kandyan” referred only to the Sinhalese population of the Kandyan regions, that is the descendants of the original (pre 1815) inhabitants and subsequent kandyanised (fully integrated) migrants. “Sinhalese who retained their identity as “Low Country Sinhalese” did not fall into this category” (Goonesekere 1987: 28). Finally, the Kandyan Succession Ordinance No 23 1917 clarified the position of children from “mixed” marriages between low country and Kandyan Sinhalese (Goonesekere 1987: 30), and as a result the distinction (between “Kandyan” and other Sinhalese) was legally formalised.

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Hayley and Goonesekere disagree about when, in state legal terms, this transition was effected (Hayley 1993: 31-33; Goonesekere 1987: 11-24)

The effect of this policy was to create the state legal category of “Kandyan” as the people to whom a specific law, “Kandyan law” applied. In effect Kandyan Sinhalese became defined by the law attributed to them. Equally importantly, in treating the Kandyans as a distinct group of people by reference to “their” law, the colonial administrators actually “accentuated” the “moderate local variations” (Ryan 1993: 54) in cultural practice between the highland and lowland regions. Thus not only did the “Kandyans” become defined by their created law, that law also served to create a distinct cultural identity which remained influential in late twentieth century Sri Lanka.

#### B. The Creation of Kandyan Adoption.

Despite a continuing debate amongst social historians about many of the consequences of colonial rule, there is a general consensus that British policies in the second part of the nineteenth century saw the creation of an unprecedented market in land (see for example Peebles 1995; de Silva 1981 Chapter 20; Hettiarachchy 1982). One policy that acted as a catalyst for the property boom was enacted through Ordinance No 12 of 1840, entitled “To Prevent Encroachment on Crown Lands.”

The basis of this ordinance was the assumption that in Sri Lanka, as in feudal Europe, the king “owned” all land. This was in fact to reduce a complex social system, in which services (*rajakariya*) were rendered to the king and chiefs on the

basis of both caste and land holding, (see Peebles (1995) and Hettiarachchy (1982) for varying views on *rajakariya*), to the more familiar European model. Since the king had owned all the land, the assumption continued, ownership passed to the British crown which was entitled to sell it. The ordinance specifically targeted “wasteland” that is land that was generally unused, but included *chena* land, that is land used for slash and burn cultivation, which was integral to peasant food production (Hettiarachchy 1982).

In the years 1840 to 1845 329,247 acres were alienated to both foreign and local buyers, often at the expense of peasants who could not establish title to the property (Hettiarachchy 1982: 108, 110). In part this demand for land was created by European investors intending to develop the plantation sector. Equally, changing social relations connected with European land and administrative policies meant that there was a local demand for property. Both existing and rising Sri Lankan elites tried to enhance their status through acquisition of office and land (Hettiarachchy 1982; Peebles 1995; see also Spencer 1990a: 102).

This concern with property rights ensured that they became a key area in the development of Kandyan law, to such an extent that a century after the process began, a Legislative Councillor (introducing the motion for a Kandyan Law Commission) suggested that “The main feature of the law is the preservation of the property in the family. This is the one main principle underlying the whole law.” (Sri Lankan Government 1927:307).

One aspect of Kandyan property law, the treatment of adoption and property rights, had important consequences for the way children received into other families was understood. A series of judges and legal commentators tried to clarify and formalise local procedures for the adoption of heirs, a practice that was regularly said to be going out fashion. Fundamental to their analysis was a distinction between legitimate and illegitimate relationships; what could be recognised as “real” legal adoption and what was merely an informal arrangement with no (state) legal meaning.

The discussion in Modder’s “Principles of Kandyan Law”, a classic text book published in 1914, illustrates the nature of this process. Modder deals with adoption as part of a chapter on intestate succession, and defines adoption as “the right whereby an adopted child is invested with the status of an heir to the estate of its adoptive parents.” (1914: 537). This definition is expanded by a series of comments extracted from previous cases and the pioneering texts of Armour and Sawers. These describe adoption as an ancient practice, “especially amongst those who were possessed of considerable property and had no children of their own.” (1914: 537-538).

Having suggested some basic principles by which to define a valid adoption, Modder provides several case examples in which the question of validity was examined. Specifically excluded from validity were “Acts of kindness and generosity” (1914: 546). That is, it was not enough to rear a child in a family, who

then “contracted marriage and dwelt with his wife in the house of his patron, and cultivated his lands, ...such circumstances alone would not be construed into a legitimate adoption, unless it could also be shown that by agreement with the natural parents of the child on its removal, or by subsequent declarations and acts of the adopting party, a clear intention was manifested by him to adopt the child as his own and to make him an heir to his estate. (Carr J Wedda v Balia 1843 Ram 1843 - 55)”(1914: 546).

As Goonesekere notes, “The lack of fixed rights of inheritance has been stressed by writers and judges familiar with the institution of adoption for succession in Roman law, and the English law concept of ... [fostering] and the relationship between nurturing parent and child has been distinguished from legal adoption.” (1987: 358). In other words English trained judges applied their own model of adoption in their interpretation of local practices. This was done in such a way that other reasons for receiving children into families became the negative foil for “legal” Kandyan adoption. These relationships became not adoption, and by being excluded from legal recognition a series of alternative relationships were created as potentially illegitimate.

This process was only confirmed by the report of the Kandyan Law Commission which was published in 1935 (Sri Lankan Government 1935d). The Commission’s aims were threefold: to deal with uncertainties in the Kandyan law; to re-establish aspects of that law which had been misinterpreted; and to alter or add to that law

“where it may no longer accord with modern conditions” (1935d: paragraph 23). Kandyan adoption law was put under this scrutiny, and the problems of establishing a valid adoption examined. The outcome was a decision that the current situation in which various attempts were made by litigants to secure evidence of validity in the terms required “is really to set a premium on perjury. It was recommended that a valid adoption should be by deed witnessed before a notary (1935d: paragraph 87).

In making this recommendation, the Commission in fact provided a refinement of the European influenced interpretation of Kandyan adoption. Far from “re-establishing” areas of law the Commission had relied once again on nineteenth century sources, and had failed to go back beyond these sources, beyond the originary moment when Kandyan law was given its form, in order to consider the nature of adoption practices in general. As a result, relationships which fell short of adoption for inheritance purposes were excluded from Kandyan law (see Kandyan Law Declaration and Amendment Ordinance No 39 1938). The effect of this exclusion was to create a situation in which such relationships could potentially be treated as illegitimate in state legal terms, since they were neither recognised as legally valid, nor were they defined as illegal or ineffective. Instead, the majority of “adoptive” relationships were left in a (state) legal limbo by the work of the Kandyan Law Commission.



## **The Creation of Quasi Adoption.**

At the same time as the Kandyan Law Commission was sitting, however, another report was being prepared on the employment of women and child servants (Sri Lankan Government “Sessional Paper II” 1935a). Unlike the Commission, this investigation did consider alternative practices for receiving children into families.

The inquiry was instituted in response to concerns generated by two public scandals. The first was the “Vallai murder” which occurred in 1932. The victim was a young woman who had been recruited by an employment agency to go as a servant to Jaffna, and who was subsequently found dead in suspicious circumstances. The second sensation was created by the trial (and acquittal) of the manager of an orphanage for the sexual abuse of some of his charges. In addition, there were apparently “complaints from parents” about their children who were placed as servants, and general “public feeling” about their treatment (1935a: 3)<sup>3</sup>. As a result, the inquiry focussed explicitly on the situation of children placed outside their immediate family, both in orphanages and in private houses.

As an initial point, the report suggests that in many cases children are placed with other families under a system of patronage, “...a long established social custom for parents in indigent circumstances who are unable to maintain, educate and bring

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See also Sri Lankan Government Administration Report of the Inspector General of Police for 1934 (1935e: A12).

up their own children, to hand them over to wealthy neighbours to be brought up as proteges...” (1935a: 11-12). This view is corroborated by other (European) commentators, such as Modder and Knox (Knox 1966), who suggest that this form of child placement has existed in Sri Lanka since at least the seventeenth century. The inquiry report describes such placements as “quasi adoption” and asserts that as a rule, quasi adoption is both humane and beneficial (1935a: 4, 8). However, in discussing the concerns raised by the Vallai murder, and domestic employment in general, the report does identify some categories of children involved in quasi adoption who may be at risk.

One group of children considered in the report are those described as “unwanted”; that is illegitimate children. The report suggests that these children may benefit from quasi adoption, with foster families “where the circumstances of their birth can be effaced as completely as possible from their lives” (1935a: 24). However, although foster placement is considered the best option for unwanted children, there remains a concern that such children, who by definition do not have any family contact, may be abused by some carers.

Another area in which concerns are raised is one which continues to trouble contemporary policy makers, the possibility that children in quasi adoptive placements may be required to undertake what is described as “family work”. This may take different forms:

“In the homes of wealthier families, child servants do no more than attend on or play with the younger children of the family. In less wealthy homes...varying amounts of household duties fall to the lot of these child servants who have the misfortune to be born of poverty stricken parents in a poor country” (1935a: 30).

Unlike contemporary commentators though, the possibility of these “dependent” children working does not, in itself, cause the report’s authors particular anxiety. It is seen rather as a matter of regret, and there is no expectation that such family work should be controlled in any way, any more than family work done in parental homes (1935a: 22, 30). An exception is made however, in the context of the concerns raised by the Vallai murder, where children are placed at a distance from their families, making family supervision difficult and exploitation possible.

In particular children who are recruited through “mushrooming” servants agencies or professional procurers and placed with families who have “begun to copy the privileges” of the “chiefs and other leading persons” are seen to be at risk (1935a: 4). The report’s authors express a sense of disquiet about these children, whose situation seems to represent a distortion of a “smoothly working” social system (1935a: 21). In the first place they tend to be living at some distance from their parents, often in urban areas, and are therefore separated from their families. In addition, the system has been shifted, from the rural areas to the urban, and from the “chiefs” to the new middle classes. As a result the children concerned are

feared to be vulnerable to abuse and exploitation by “unworthy persons”, unchecked by family intervention.

What Sessional Paper II seems to be suggesting is that although quasi adoption is generally acceptable, the practice in its new manifestations, where children are placed with classes of people who would not previously had access to them, and at some remove from their biological family, (either geographical or social, as in the case of unwanted children), poses some risk to children. As a result limited regulation (see below) is proposed. This analysis is in contrast with current approaches to informal placements, in that in the report, continuing contact with the biological family is treated as safeguarding children from abuse.

Having discussed quasi adoption, the inquiry report also goes on to mention what it calls “real” adoption. The difficulties associated with Kandyan adoption and the absence of any other effective state recognised form of adoptive placement are both identified as problems. The solution proposed is a new adoption ordinance, making state legal adoption available “to any person domiciled in Ceylon”. The purpose behind an adoption ordinance would be to “secure to adopted children their rightful privileges”, but it would also, it was felt, reduce the incidence of the “innumerable types of quasi adoption” known in Sri Lanka.

The discussion of adoption marks a culmination in the process of configuration of children in receiving families, which occurs in the report. As in the debate about

Kandyan adoption, a fundamental distinction is made between “real” adoption and quasi adoption. The very use of these terms is revealing, suggesting that informal placements are merely pale imitations of state sanctioned arrangements.

Nonetheless quasi adoptive placements are endorsed to an extent by the report, their appropriateness (and therefore potential legitimacy) being gauged by the nature of the continuing contact with the family. This is in contrast to the current configuration, where, as we shall see, the relationship between the child and the receiving family is the defining factor.

Only two forms of quasi adoption are discussed in any detail in the report, the placement of unwanted children and the employment of “dependent” children. Other types of informal placements, for training, education or as expressions of obligation or concern, for example, remain unrecognised and undiscussed. This is underlined by the statement in the concluding section of the report that, apart from the fostering of unwanted children, “All other forms of relationship between an adult and a child, excluding cases of natural guardianship, must be considered to be that of a master and servant.” (1935a: 38).

The analysis in Sessional Paper II goes further than that of the Kandyan Law Commission because different forms of informal placements are actually considered. They are though, considered in terms of a metropolitan model which stresses family responsibility and regulation through law. The “innumerable forms” of quasi adoption are effectively reduced by the report’s authors to two

types, those which conform to ideas of fostering and those which amount to child employment. Only these types of informal placement are formally recognised. Different interpretations of the child adult relationship are not admitted to the official version of the patronage and child placement system. Instead they are excluded and marginalised. The fact that they are not officially recognised, creates the possibility that placements for reasons other than employment or the fostering of illegitimate children, may be treated as illegitimate both in policy making decisions, and in the law courts. Significantly it is this configuration of the patronage system, and particularly the confusion between quasi adoption and child employment, which continues to be influential in the way informal placements are interpreted in official circles in contemporary Sri Lanka.

### **The Era of Reform.**

Sessional Paper II was written during a period of transition for Sri Lanka, as the country moved towards political independence. The Donoughmore Constitution (1931) transferred limited authority to local politicians on basis of universal suffrage, with full independence finally being achieved in 1948.

Colonial rule had, as Kapferer suggests (Kapferer 1988: 91), supported the development of ethnic boundaries in Sri Lanka. This is hardly more clearly demonstrated than by the creation of Kandyan law and the codification of other customary laws in terms of ethnic group. The “Kandyan minority” was also

supported by Governor Manning during the 1920s, to the extent that they were granted communal representation in the pre Donoughmore constitution; Manning also promoted the interests of the Tamil minority, and according to de Silva (1981: 390), was instrumental in destabilising the pre-existing harmony between Tamil and Sinhala politicians. During the early decades of the twentieth century the major political divisions fell along caste lines, but by the 1930s the beginnings of the politics of ethnicity was identifiable.

The increasing influence of nationalism and ethnic ideas is illustrated by the rise of “Protestant Buddhism”. This label is applied by Obeyesekere (see for example Gombrich and Obeyesekere 1988) to a form of Buddhism that emerged in the late nineteenth and early twentieth centuries. Although it retains the basic tenets of “traditional” Buddhism, a central characteristic, the basic conviction that the laity are as capable of achieving *nirvana* as are members of the *sangha* (Buddhist order of monks), marks out the influence of Protestant philosophy (1988: 215). One result of this focus on the laity, is the requirement for a careful monitoring of lay behaviour, so that it accords with religious principles. This monitoring has been translated into codes of behaviour which have, according to Gombrich and Obeyesekere, shaped the values of the rising Sinhala bourgeoisie (1988: Chapter 6). Protestant Buddhism found expression in the temperance agitation which occurred between 1900 and 1914, and subsequently in the *mahajana sabhas* movement which promoted conservative Buddhist ideals. In political terms, both the temperance and *mahajana sabhas* movements challenged Christian (that is

colonial and *karava* caste) influence in society and politics. By the 1930s, though, the activism of the *mahajana sabhas* had faded, and the movement was replaced in 1937 by the much more radical Sinhala Maha SAA, established by Bandanaraik, which advocated independence in the exclusive form of a Sinhala Buddhist polity, at the expense of the Tamil and Muslim minorities (de Silva 1981: 445).

Although national and ethnic identity became increasingly significant, the transitional government in the 1930s and 1940s continued to be dominated by the conservative policies of an English educated elite, led by D. B. Jayatilaka and D.S. Senanayake, both of whom had also been associated with the *mahajana sabhas* movement. The same period also saw the rise to prominence of Marxist political parties. All shades of political opinion were engaged in an ongoing debate about the future direction of the new nation state, a debate that was heavily influenced in all quarters by modernist thinking on appropriate forms of development. In the circumstances it is perhaps not surprising that both modernist and nationalist ideas were important in structuring Sessional Paper II's approach to quasi adoption.

#### A. Modernisation and Quasi Adoption.

Modernisation here refers to ideas already touched on in Chapters 1 and 2, for instance in my discussion of Donnelly (1986). "Modernisation" suggests change in a concrete sense, such as industrialisation, and also in a conceptual sense, change as progress, as movement towards an ideal. In this paradigm tradition and modern



are often juxtaposed, with tradition representing stasis (as in Donnelly's analysis). The juxtaposition of traditional practices and modern circumstances is also a pivotal theme of Sessional Paper II. In this version of the dichotomy the concern is not to transcend the traditional through progress towards modernity, but to conserve or create traditional practices in the face of the necessary social change which accompanies modernisation. In the discussion of quasi adoption, the authors consistently contrast a "pristine" family system with strong affective values (1935a: 8, 11, 13, 20), with the damaging effects of modern developments (1935a: 13). So, for instance, the report suggests that "the oldest" "semi feudal" system of recruiting servants (including children placed in quasi adoption) "led to no abuse" (1935a: 8). At the other end of the scale there are the servants agencies, described as being of recent growth in response to severe economic crisis (1935a: 10). These agencies (or "nearly all" of them) are accused of "exploit[ing] the servants, young and old...at the most trying period of the acute trade depression the poor of this country have had to pass through" (1935a: 19).

The positive characterisation of "traditional" quasi adoption is used to justify the report's position in relation to another theme of modernist thought, the question of state regulation. Although all quasi adoptive relationships are treated as forms of employment (see above) the report argues that in general quasi adoption affords protection to many children. Based on this assumption it is proposed that direct state regulation of child placement should be limited. It is recommended that there should be no minimum age for this form of "non industrial" employment and the

authors stress that there should be a “minimum of inspection” of child placements. The suggestion that a more inquisitorial regime should be established is rejected, on the grounds that it would be impracticable, unacceptable to the public at large and “close for ever to necessitous children many benevolent and hospitable homes which serve at present as excellent foster homes.” (1935a: 26).

It is proposed that only three specific groups of children should be made the subjects of direct regulation. Children who are to be integrated into receiving families are made the subjects of the one off scrutiny of the courts under a new adoption ordinance. Once a (state) legal relationship between the child and the receiving family is established no further regulation is deemed necessary. In contrast, in the case of children described as “unwanted”, the ongoing regulation of receiving families through custodianship provisions is proposed. The third group to attract direct regulation, are children deemed to be employed *and* to be working too far from home for parents to supervise the placement. For these children the report suggests “a simple system of registration”, by which the address of the child’s parents would be held in a central bureau so that parents can be contacted should the need arise (1935a: 25, 26).

The decision not to regulate what is taken to be the majority of children in quasi adoptive placements, conforms to the proposition that there should be only limited state interference in informal placements. Despite this proposition, though, the report suggests that there should be comprehensive *indirect* regulation of such

placements through the enforcement of compulsory education legislation (Education Ordinance No 1 of 1920). Under this legislation any person with the custody of a child (of the relevant age group) was required to send him or her to school. If enforced, the report points out, this would mean that not only children living with their parents but also children in other families would be sent to school, thus restricting the amount of work that any child could undertake. The effect of this proposal would be to apply state intervention to all quasi adoptive placements. In addition if compulsory education provisions were enforced this would act to delegitimate arrangements where children were not receiving education. On the other hand, and contrary to current strategies for the elimination of child employment, if a child was educated in an informal placement, in which he or she also works, that placement would be legitimated.

Sessional Paper No II settles the question of state intervention by arguing for a laissez faire approach; limited direct involvement which masks a much wider form of regulation through education provision. For the authors of the report the question is not whether there should be state intervention, rather it is how far the state should intervene, and how far placement arrangements should be left to the “private” sphere of the family. In taking this approach the report reproduces one of the central themes of the modernisation paradigm; a theme which also constrains opponents to the reports proposals.

SA Wickremasinghe was a member of the inquiry team which prepared Sessional

Paper II. He was also a left wing opposition politician, and was vehemently opposed to the approach taken by the inquiry. In a dissenting report he sets out to challenge the views of the majority, and he does so not by rejecting modernist ideas, but by reproducing them with a different emphasis.

As a fundamental point Wickremasinghe repudiates the whole notion of quasi adoption as a benign custom. The “pristine” family system no longer exists, if it ever did (1935b: 7), and what is prevalent in Sri Lanka is a form of child service rather than quasi adoption, a practice which is completely contrary to children’s interests. His analysis relies on a scientifically based model of child development which rehearses some familiar ideas (1935b: 3). Within this model children have particular needs which can be identified. As Wickremasinghe describes it, child employment (and especially domestic service) is inimical to child development, since it “stunt[s] growth both mental and physical, it limits education, and deprives the children of the right of comradeship in joy and play.” (1935b: 23, also 11,12). Connected with Wickremasinghe’s scientific approach, is the translation of scientific data into the idea of a childhood norm applicable to all children in Sri Lanka. In his view it is the responsibility of the state to secure conformity to this norm, and this is Wickremasinghe’s solution to the problem of child domestic service, “extensive social legislation.” (1935b: 13) not the halfhearted and “neglectful” (1935b: 25) policies of the majority report.

Wickremasinghe’s configuration of child placement is in contrast with that of the

majority report (and strikingly compatible with contemporary ideas on child work). Children who do domestic work outside the parental home are, in his view, *ipso facto* child servants. Education cannot in his view be used to legitimate such placements, “If compulsory education is to be strictly enforced I cannot see that there is any further room for the employment of children.” (1935b: 17). However the main point to make about his arguments is not that they differ from the those of the majority report, but that they exist along the same continuum. He accepts the tradition versus modern dichotomy, but finds that traditional society no longer exists. He argues for more rather than less state intervention, but the argument is still about the extent of state involvement into the “private sphere” rather than the fact of it. As suggested in Chapter 2 it is this continuum of ideas that continues to influence policy debates outside Sri Lanka on the question of child employment and, as will be seen, also influences contemporary debates within Sri Lanka.

#### B. Quasi Adoption and Nationalism.

Tambiah, in his book *Buddhism Betrayed* (1992), argues that over the last century the emerging Sinhala identity has been influenced by the language of mainstream nationalism. “This modern Sinhala Buddhist nationalism, while it carries or activates a legacy from the past, is a change to a new nationalist and nation-state-making complex.” (1992: 172). Tambiah makes this argument in response to Kapferer’s work on Sinhala identity. Kapferer, while acknowledging the importance of a “wider ontology”, which would include the mainstream modernist

nationalism identified by Tambiah, stresses the continuity of a Sinhala Buddhist ontology which has shaped perceptions of self and other across the generations (1988: 43).

Ontology in Kapferer's terms is a logical structure, "beneath the level of conscious reflection" (1988: 84), which actively structures and interprets reality. In order to chart this sub conscious level, Kapferer turns to the logic of Sinhala myths, seeing them not as simply a way of legitimating social and political practices but as integral to ways of perceiving the world (1998: 45). One element of the Buddhist ontology on which Kapferer concentrates is the idea of the state. He suggests that in this perspective the state has an encompassing and ordering power, on which the integrity of the nation and of the individual relies. The failure of the state to maintain hierarchical order, although part of the cosmic cycle, is threatening, with failure of order associated with fragmentation and descent down the cosmic and social hierarchy. Tambiah questions whether this notion of the role of the Buddhist state was as valid at the time of sixth century myths as it is in the twentieth, and suggests that it is the creation of modern nationalist discourse.

Kapferer's position is undoubtedly problematic, as Tambiah points out he appears to be arguing for an ahistorical Buddhist ontology, but it is also important for challenging the universalist arguments of Tambiah and others (see his intemperate response to Spencer's critique in *Current Anthropology* (1990) Vol 31 No 3 (Spencer 1990b) in which all nationalisms contain similar elements, and in

recognising the role of local ontologies in shaping nationalist identities.

Both universalist and local ideas of nationalism can be found in Sessional Paper No II: Wickremasinghe expresses mainstream universalist ideas, and a more specific local brand structures the majority report.

In Wickremasinghe's report the nationalist theme is represented by the twin ideas of poor social economy and a tendency to social degradation. He suggests that a peculiarly exploitative colonial economic structure has created a situation in Sri Lanka where even feudal safeguards have been removed, and the poorer classes are trapped in economic subjection (1935b: 7, 9). Quasi adoption is a case in point involving as it does an extension of the tradition of subservience into modern social circumstances, which "means above all economic waste." (1935b: 7). Further "... human progress only marches when children excel their parents." (1935b: 7). In other words quasi adoption is an obstacle to *Sri Lankan* progress, an indicator of the country's degradation (1935b: 7, 9, 10) and should be eliminated through social legislation. Such legislation would be, he suggests, a positive national investment (1935b: 13), an idea that continues to be expressed in many current international discussions of child labour.

Wickremasinghe uses nationalist arguments to reinforce his demands for an extensive welfare system. The majority report, in contrast, uses nationalist arguments to defend quasi adoption and thus to justify more limited welfare

proposals. The positive characterisation of quasi adoption involves the rejection of criticism that the practice is inherently abusive with parallels to child slavery (1935a: 12, 25). The report portrays such criticisms as the failure of well meaning but ill informed people, particularly people from outside the island (1935a: 12), to understand an essentially benign Sri Lankan institution. In so doing the report reaffirms a positive Sri Lankan identity in the face of external disapproval.

It is also arguable that a particular Sri Lankan identity is at stake in the majority report, an identity which relates more closely to the social and political context of the country than Wickremasinghe's calls for national investment in children. This difference is intimated by the decision to exclude from the inquiry team's investigation what is described as "Indian immigrant labour" (1935a: 8). Hindu Tamil workers from the Indian mainland were employed in the plantation sector from the 1830s, partly because of the reluctance of the local population to work on the estates. By the 1930s the families of many of these immigrants had been living and working in Sri Lanka for a couple of generations. Nonetheless they had never integrated with the local community and they continued to be perceived as outsiders, in part because they added substantially to the existing Tamil population. In political terms this exclusion was confirmed by statutes passed in 1948 and 1949, including the Ceylon Citizenship Act, which denied citizenship to the Indian Tamil community. The Sessional Paper in its turn was concerned not with "immigrants" but with the "indigenous" population, specifically the Sinhala population.



This concern is demonstrated by the way that children are represented in the report, as is illustrated by discussion of the situation of three children highlighted in the report. The first child is a little girl from Matara, in the south of Sri Lanka, found living in Jaffna in the north of the island. She is described as being in a state of transition from her own language to a “strange tongue”, a process that had badly affected her mental development. Concerns are also expressed about a girl of 15, living in Matara town itself, who had been staying with a Muslim family for some time and lost touch with her mother. This girl is presented as “looking every inch a Muslim and laughing at her mother’s grief.” Finally a “Kandyan Sinhalese” girl of 18 is mentioned living in Jaffna “who should ordinarily never have left home” (1935a: 11).

In all these situations there are underlying concerns about the identity of the children. The child living in Jaffna had literally lost her voice, but she is also in danger of losing her identity, through an enforced transition from her (Sinhala) mother tongue to a strange (Tamil) tongue. The fact that she is making a linguistic transition from Sinhala to Tamil is not articulated by the report. There would have been no need to do so. A child from Matara (with a majority Sinhala population) would almost certainly be Sinhalese, the language in Jaffna (with a majority Tamil population) almost certainly Tamil.

In contrast the girl living in Matara has already lost her identity and her religion, slipping from (presumably) the Sinhalese to the Muslim community through the

medium of placement in another family. As discussed, quasi adoption and employment are portrayed in the report as presenting particular problems when they are associated with distance. In part this is due to a sense of new movement (1935a: 4, 25) and dislocation (1935a: 7, 17), together with a loss of parental control (1935a: 12, 26, 31), in part also to the “great harm” inflicted when children moved between communities (1935a: 11).

The third case of the Kandyan Sinhalese girl found in Jaffna is representative of one of the major concerns about distance expressed in the report, that of vulnerable Sinhalese women employed away from home. This time the girl had found kind employers. Elsie, the young woman at the centre of the Vallai murder case had been less fortunate. So had several others. The report states that between March and June 1933 four Sinhalese women were admitted to Jaffna hospital as the result of pregnancy, and others reported being encouraged to “accede to improper suggestions” by the servants agency that had transported them to Jaffna (1935a: 18). In effect Sinhala women were being taken to Jaffna and corrupted.

Taken together these three cases are indicative of a specific concern with Sinhala identity which pervades the report. It is a concern expressed through ideas of fragmentation and corruption, ideas which Kapferer suggests are central to Sinhala Buddhist ontology, and which continue to have resonance in contemporary child related policies. In the cases highlighted here the first child in particular seems to have come close to total disintegration, stuck in transition between communities;

the second girl seems at least to have been coarsened by her experiences; while the young Kandyan woman is threatened with sexual corruption. In all three representations interaction with the Tamil and Muslim communities is seen as the problem; with Tamils and Muslims being portrayed as the negative other of Sinhala identity. The result is a construction in which the abuses of quasi adoption are presented as abuses which adversely affect the Sinhala majority, a construction which reinforces the need for preventative action. At the same time the perceived positive aspects of the practice together with the laissez faire modernist impulses of the majority report combine to support policies which would *legitimate*, in some form, the quasi adoption system, while excluding other arrangements.

### **Quasi Adoption and the Legislative Model.**

In the pre independence period there were criticisms that welfare policies concentrated too closely on the estate sector, as the engine of the colonial economy. For instance the Minimum Wages Ordinance, passed in 1927, applied only to workers on the estates. Despite the fact that this legislation did very little to ameliorate the low wages and poor working conditions experienced by the estate population (Jayawardena 1984), it nonetheless helped to increase Sinhala resentment of “immigrant” workers in the absence of equivalent provisions outside the estates sector (de Silva 1981: 411). Perhaps as a result very little was done to maintain or develop the welfare system on the estates for many years after independence, a neglect that continues to be felt today.

As independence approached the policy emphasis shifted. Considerable effort was made to create a more universal welfare system building on the recommendations of a series of sessional papers published by the transitional government in the 1930s and 1940s. The end result has been described as a “somewhat aberrant welfare state model” characterised by an emphasis on income redistribution and responsiveness to universal needs (Jayasuriya et al 1985: 320). A particular feature of this model was the acceptance, unusual in a post colonial country, of free education for all, up to and including tertiary level (Education Ordinance No 31 1939 as amended). The importance given to education in Sri Lankan society is reflected in this policy, which appears to have been extremely successful when judged in terms of participation rates (57 % in 1946; 72% in 1963 (Gunatilleke 1985: 6)) and literacy levels (57.8% in 1946; 87.2% in 1986 (Wickremasinghe 1996: 1)). Universal free education was also a popular policy because it challenged the hold of the christianised elite over the education system, and access to education has continued to be a political issue in the years following independence.

At the same time as this universalist model was being introduced (a comprehensive health system was also developed), the new state adopted a much more restricted approach to personal social service provision, acting as “reluctant caretaker” of the specific needs of vulnerable groups (Jayasuriya et al 1985: 321). To this extent the line taken by the majority in Sessional Paper No II proved influential. Instead of the detailed interventions proposed by Wickremasinghe in his dissenting report, a

legislative framework was introduced that attempted to regulate rather than prohibit child placement as a way of meeting the needs of employed, dependent, unwanted - in fact “problem”- children.

Three ordinances in particular set the tone for the treatment of problem children: the Children and Young Persons Ordinance No 48 1939; the Adoption Ordinance No 24 1941; and the Employment of Women, Young Persons and Children Act No 47 1956. Significantly these ordinances follow western legislative models and introduced policies which were structured by the discourses of childhood discussed in Chapter 2, with very little attempt made to accommodate to the local Sri Lankan context. Equally, it should be noted that these ordinances are still in effect.

Metropolitan ideas were central to the development of these policies. In particular the idea of the public/private division of responsibility towards children was influential. This is a notion which continues to be fundamental to the development of welfare strategies (including the CRC). It was anticipated that the private family sphere would shoulder the main responsibility for the care of all children, including problem children, a corollary of the assumption that the family is responsible for the socialisation of children. The role of the public sphere, in the form of state agencies, was limited to monitoring the care provided by families, with direct intervention only in acute cases, such as juvenile offenders, where family responsibility had failed.

Juvenile offenders were the focus of the first major piece of legislation designed to implement social policies in respect of children, the Children and Young Persons Ordinance (CYPO). Still in force, this is an ordinance which demonstrates the extent of metropolitan influence on the development of the welfare programme. It was passed in response to another committee report, Sessional Paper IX (1935) (Sri Lankan Government 1935c), which highlighted the problem of “a rising tide of crime amongst the young” (1935c: paragraph 36). Using the English Children and Young Persons Act 1933 as a model, the authors of the report recommended the creation of a network of juvenile courts supported by a newly reorganised and revitalised Probation Department, and backed by the establishment of a remand home for young offenders. Only one specialist juvenile court was proposed, for Colombo. The report anticipated that in other towns the local police magistrate would sit as juvenile magistrates, in premises specifically set aside to be juvenile courts.

The choice of the 1933 Act was inspired by the Secretary of State for the Colonies, who “suggested that any action taken should as far as possible be in conformity with the principles of a model Ordinance a copy of which was forwarded by him. This model Ordinance closely resembles the English Children and Young Persons Act ..., the provisions of which we followed closely in our draft Ordinance...” (1935c: paragraph 35). But the British influence goes beyond the straightforward suggestion (or dictation) of legislation and its subsequent adoption. The rationale behind the proposed legislation was rehearsed in terms which suggest that its

acceptance was not simply perfunctory. What is apparent is that the report's authors shared an understanding with policy makers in Britain of the universal, but simultaneously contextual, nature of juvenile offending.

A central theme of British social policy, in the late nineteenth and early twentieth century, was the need to control juvenile offending through reform and re-socialisation, as distinct from punishment. This approach to juvenile crime involved the perception that environment (for which read upbringing) and criminal behaviour were closely linked, and that placed in the right environment a young offender could be re-socialised to the benefit of all (Harris and Webb 1987: Chapter 1). Citing "well known criminologists in England and in America", Sessional Paper IX develops a similar connection between crime and environment. It was realised, the report argues, "that the cause of such [criminal] wrong doing, especially in the case of children, was wholly external..." (1935c: paragraph 25). As a result children could not be held (wholly) responsible for their actions, "society assumed a deficiency of will power and required stricter proof of deliberate intent." (1935c: paragraph 26).

The stress on environment rather than self in the production of child criminality, reflects the tendency to make a distinction between children and adults, a distinction fundamental to the configuration of children by the child development discourses discussed in Chapter 2. In this case, the presumption that child offenders are not wholly responsible for their actions demands that a broader

explanation be found for their behaviour, an explanation that looks into the child's whole history and background. This demand translates into the need for a forum in which both child and environment can be investigated and rehabilitated, a forum familiar from Donzelot's analysis (see Chapter 2) and constituted by the juvenile court. It is, the Sessional Paper suggests, the duty of the juvenile court to "take the necessary steps to inquire into the environment which led to the child committing the offence and to take necessary steps to change that environment". Intervention, then, depends on information with the probation officer as the key informant (1935c: paragraphs 57 and 58). As Donzelot argues, the juvenile court becomes the nexus between normalising child development discourses, represented in Sri Lanka, in attenuated form, through the probation service, and judicial authority, in the form of the juvenile magistrate (Donzelot 1980).

The focus of this scrutiny is not only the child, but also his or her family. This is implicit in the assumption that it is the child's environment which is significant in behaviour and social development, an assumption which again is central to the child development discourses discussed in Chapter 2. As discussed, this concern with the child's environment applies not only to young offenders, but to all children, including another group to be dealt with in the juvenile court, children "in need of care or protection".

The 1933 Children and Young Persons Act represents a particular stage in the development of child care policy in Britain, in which the boundaries between



children who were depraved, and those who were simply deprived, became increasingly blurred (Harris and Webb 1987: Chapter 1). A similar blurring in favour of the juvenile offender can be seen in the statement, in paragraph 30 of the Sessional Paper IX, that child offenders should be treated in the same way as neglected children. Unlike the 1933 Act, the Sessional Paper itself did not go on to address the situation of deprived children, although it anticipated that the Juvenile Court “can readily be clothed with power to enforce all other laws affecting children, as for example...child neglect.” (1935c: paragraph 32). However by the time that the CYPO was enacted, sections 34 to 38 had been incorporated, dealing specifically with children and young persons “in need of care or protection”. These sections replicated the provisions of the 1933 Act (Sri Lankan Government Hansard: 1938b) and in effect ensured that not only were child offenders (generally) to be treated as neglected children or children in need, but neglected children were to be treated as child offenders.

The notion of parenting is important in understanding the way in which “in need of care or protection” may be interpreted. The definition contained in section 34 of the CYPO deals with two groups of needy children: firstly, children who are the victims of, or vulnerable to, sexual or physical assault, and secondly, children who are receiving no, or inadequate, parenting. The second group of children is defined as those who “having no parent or guardian or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, [are] either falling into bad associations, or exposed to moral danger, or beyond

control...". From this definition it is obvious that the interpretation of "in need of care or protection" provides considerable scope for subjective judgement. What constitutes "beyond control" for example? At the same time any interpretation involves an assessment of parenting standards. This is explicit in cases relating to "unfit" parents, but is also significant in understanding ideas of "danger" and "beyond control". The concept of "beyond control" was introduced by the 1933 Act to permit parents to bring their delinquent children to court. However, in Britain at least, while such proceedings may have been initiated by parents, there was a tendency for courts to continue with the case in the face of parental attempts to withdraw their action (Harris and Webb 1987: Chapter 1), and for proceedings to be initiated unilaterally by the Social Services Department when an *official* considered that the child was beyond control. Implicit in this approach is an understanding that a child who is beyond control, is beyond control of their parent or guardian.

Another effect of this focus on parenting is that the status of children is established by a scrutiny of their relationship with relevant adults. The scrutiny in this case concentrates on ideas of good parenting. Parenting, it seems clear, is not good enough if it fails to exercise restraint, fails in its role of securing social conformity from children. However, and this is important for the way that child placement is configured, a parenting decision to place a child with another family is judged neither good nor bad by the standards of this ordinance. Furthermore, the responsibility for offering "proper care and guardianship" is placed upon both

parents *and* guardians by section 34. A guardian is defined by the interpretation section as “any person” who in the view of the court “has for the time being the charge or control over the child” (section 88), a definition which could include an informal foster parent or employer of a child servant, as well as a legally appointed guardian. In other words both biological and receiving families are expected to meet a child’s needs, with the corollary that both biological and receiving families have the capacity to meet those needs, a position which does nothing to stigmatise informal placements. The implication is that such placements *do not* require intervention through the juvenile court.

In this model of child care responsibilities the decision on when intervention is required is vested in the state. This position is expressed in symbolic terms by the authors of the Sessional Paper “In dealing with the child the paramount object is the protection of the child, and in accomplishing this object the State is put in the capacity of *parens patriae*...” (1935c: paragraph 31). In other words the state becomes the ultimate parent and as such is the arbiter of what constitutes good parenting. The representatives of this abstract state are those charged with responsibility by the juvenile court process. The magistrate, the probation officer, the police officer are all given the power under the ordinance to judge the individual child and his or her family. Significantly, at the heart of this judgement is the exercise of discretion under section 34, a discretion that has proved crucial in the reworking of ideas on child placement in contemporary Sri Lanka. Although the practice of child placement is not directly addressed by the ordinance, it is now

being interpreted in the Colombo juvenile court at least, as evidence of inadequate parenting.

A concern with the family as an appropriate environment for children also underlies the Adoption Ordinance that was passed in 1941. This ordinance deals with two forms of family unit, the adoptive family and children living with custodial adults. Both these arrangements are artificial relationships constituted by law, and both are deemed to create environments that support the welfare of the child (sections 4 and 19).

The adoption provisions in Part 1 reflect to a large extent existing British adoption law as set out in the Adoption Act 1926. Consequently they provide for an adoption process through the law courts, with restrictions on who can adopt, a requirement that adoption should be in the best interests of the child, and significantly, the legal dissolution of blood ties with the child's biological family. For instance, there is a requirement that a court on making an adoption order should, unless "inexpedient", confer the adopter's name on the child (section 6). This will then be the name that is recorded in the Adoption Register rather than the child's original name, thus removing traces of the child's previous identity, and identifying the child with his or her "new family".

The effect of these adoption provisions is to create a situation in which the child is almost fully integrated with the adoptive family, unhampered by old associations.

He or she becomes for virtually all purposes “ a child born in legal wedlock to the adopter” (section 6). This level of integration is in complete contrast to quasi adoption (and to Kandyan and Hindu adoption law as codified), and was, and is, only likely to be attractive to families prepared to offer a complete and exclusive commitment to the child concerned.

The limited relevance of the first part of the ordinance was stressed at the time it was introduced. DB Jayatilika (who chaired the 1935 inquiry which resulted in Sessional Paper II) suggested that “after all [it would affect] not a very large number of individuals” (Sri Lankan Government Hansard 1941: 443). This prediction has proved to be accurate. Between 1970 and 1991 local adoptions remained at a low level, with a high of 689 adoptions in 1978. In contrast foreign adoptions, legalised in 1964 became more common, and there were 1,670 such adoptions in 1986 (Sri Lankan Government 1992b). Legislation was passed in 1992 to control foreign adoption, in response to concerns about baby trafficking (Act No 15 of 1992), and anecdotal evidence suggests that the level of local adoptions have since risen. Nonetheless adoption remains a practice which affects relatively few children.

On the other hand, Jayatilika described the second part of the bill, which dealt quasi adoption, as “most important” and likely to affect “a very large number of children” (Sri Lankan Government Hansard 1941: 443). This was probable, since Part II of the ordinance was specifically intended to address the abuses of the quasi

adoption system identified in Sessional Paper II, but in so doing it went much further than had originally been envisaged in 1935. In 1935 it was suggested that only “unwanted”, and a limited number of employed, children should be made the subject of registration. In 1941 it was proposed that a family who had taken in “any child belonging to other people” would have to register his or her presence in the household. In other words the whole informal family system, all those circumstances described in 1935 as quasi adoption, was to be regulated, as opposed to discrete aspects of it.

Part II of the ordinance in fact provides for quite a detailed form of regulation. Although ties with the biological family remain intact (section 25), several duties are imposed upon custodians in respect of the children in their care. They are expected to provide adequate food, clothing and medical care for the custodial child. Custodians are also required to pay money regularly into a savings account for all children between the ages of 12 and 18 (section 21). The ordinance gives powers to Government Agents and other authorised officials to monitor whether these duties are being fulfilled (sections 19, 21 and 23).

Custodianship is not irrevocable. This, and the continuous monitoring of the custodial relationship, distinguishes custodianship from adoption and brings the arrangement closer to fostering. Equally the ordinance makes clear that this is *not* an employment arrangement. Despite the expectation that custodians will give custodial children monetary support, and the fact that they have no responsibility

to send the children to school, section 24 states that a custodial child “shall not ... be deemed to be employed as a domestic servant”. Instead the terms of the ordinance create the impression of custodial children existing in a half- way house, somewhere between domestic service and full integration into the receiving family. An attempt is made to create a family relationship, but it is clearly one that falls short of an adoptive or biological family arrangement.

The Adoption Ordinance, as enacted, appears to reverse the position taken in Sessional Paper II on quasi adoption. Rather than establishing the limited regulation of a few problem children, it treated all quasi adoption arrangements as a form of fostering (as opposed to employment) and made them subject to a high level of regulation. This extension of regulation to quasi adoption took it out of legal limbo. It created an opportunity for individuals to legitimate the placement of children with them in a way that fell short of adoption. However, the potential was created for the positive *delegitimation* of situations where individuals failed to register placements.

The reversal of the policy proposed in Sessional Paper No II, and the construction of quasi adoption as a fostering relationship, illustrates the difficulty that policy makers had in responding to informal placements which did not fall within western models of family relationships, and the consequential exclusion of irregular relationships. Although the use of custodianship suggests a more flexible response to quasi adoption than that provided by state legal adoption, since it recognises that

receiving families may not want to integrate a child fully into their lives, it is still a response within western norms. The treatment of quasi adoption remains a question of the extent of intervention, the nature of intervention and the implementation of intervention through legislation and social services.

Another consequence of the construction of quasi adoption as a fostering relationship was that there was limited scope for addressing the situation where children might be employed by receiving families. This situation was not addressed for another 17 years, until regulations associated with the Employment of Women Young Persons and Children Act 1956 (the Employment Act) were promulgated.

Pre independence, limited employment legislation had been introduced, and what there was followed the piecemeal approach of international law and targeted children working in the formal sector. For instance, Ordinance No 6 of 1923 incorporated the provisions of ILO Conventions which established a minimum age for employment in industry and at sea (Conventions No 5 and 7). Similarly the Minimum Wages Ordinance 1927 (mentioned above) made 10 the lowest age of employment on the estates. It was only in 1956, with the enactment of the Employment Act, that a more comprehensive strategy was adopted, that attempted to control child work in both formal and informal sectors.

The Employment Act re-enacted the provisions of Ordinance No 6 on work in



industry and at sea. In accordance with another ILO Convention, (No 6), the act also banned the employment of children under 14, and restricted the employment of children over that age, in industrial undertakings at night. Maintaining the distinction between the public sphere of activity and the protective private sphere, few of these provisions applied to children working in “family concerns” in the informal sector. Indeed the Employment of Young Persons Regulations (1957) went as far as ratifying the employment of “wards” aged 14 and over in family concerns at night. This regulation confirmed that children in informal placements could be employed (and not simply as domestic servants) and was passed by Parliament despite concerns that such children might be exploited (Sri Lankan Government Hansard 1958: 3012).

The Employment Act also attempted to address the employment of children, certainly children under 14, by reference to education. The majority in Sessional Paper No II proposed that quasi adoption could be controlled if children were required to attend school. To this end, the report recommended that there should be sufficient schools established in four urban areas to make this a realistic prospect, at least for those areas (1935a: 23). Part IV of the Children and Young Persons Ordinance, passed in 1939, made this proposal law, but the legislation remained hampered by the lack of schools. In 1956 the Employment Act replaced the Children and Young Persons provisions, and again gave priority to education over child employment. It was established as a basic principle that children (under 14) should not work for more than 2 hours on a day that they are “required to

attend school”, nor should they work in any occupation injurious to health or education (section 13).

The expectation that children attend school rather than work can be an effective way of curtailing child employment, in both the formal and informal sectors.

However in order to be effective the expectation has to be backed by some form of compulsion, for example school attendance regulations. Although education is extremely popular in Sri Lankan society, and the education system has been the subject of widespread reform, compulsory education regulations have never been enforced except in the estate areas (Education Ordinance 1939 Part VI). There is no day that the majority of children are “required to attend school”, so that section 13 of the Employment Act is of limited effect.

The Employment of Children Regulations (1957) add a further complication in respect of children employed as servants. The regulations establish a basic minimum age of employment (12) and then set out the conditions under which a child between 12 and 14 can work as a servant. Regulations 5 to 7 prescribe the hours that a servant can be expected to work (up to 10 hours a day, with 4 hours leisure time and 10 hours rest) as well as the minimum days off that they should receive (nearly 1 day a week, and 7 days every 3 months). In effect, child servants could be expected to work a 63 hour week, considerably longer than 16 year olds in factories and offices, and for a length of time which precluded any possibility that they might attend school.

Concerns about these long hours were raised in the House of Representatives. The reaction of the Minister for Labour, TB Ilangaratne, who introduced the regulations, is revealing. He was asked why the regulations provided that child domestic servants should be expected to work a 10 hour day, when such expectations were not placed upon other children (Sri Lankan Government Hansard 1958: 3016). Ilangaratne's first response was to argue on the basis of the figures, "With a one hour lunch it will come to eight hours". When challenged on this calculation, the minister got to the heart of the matter, "In practice we know how children are employed. They are not kept away from the homes of their employers; they are kept there in domestic service unlike in other categories. These are not children who come from home and work a few hours and then go back. They are domestic servants who live in the house of their employers and find it a second home." (Sri Lankan Government Hansard 1958: 3017).

Ilangaratne's attitude (and government policy) seems to be the product of a combination of ideas about child service. Ilangaratne's comments that child domestic servants live in a second home is reminiscent of his predecessors in 1935. It evokes again the image of a beneficial family system, in which children are less employed by, and more integrated with, the host family. In this formulation a positive distinction is made between child service and other forms of child employment. At the same time the extension of the 1935 inspired regulations to child servants accepts that this is a situation that requires monitoring. As a result child domestic service seems to exist in a sort of half way house between formal

integration with the host family, and standard employment. This ambivalence ties in with the attempt to reconstruct quasi adoption as fostering under the Adoption Ordinance, an attempt that also tried to recognise the uncertain nature of quasi adoption.

### **Conclusion: Models of Child Placement and Child Service.**

In the end, the legislative framework (the “legislative model”) introduced during the 1930s, 1940s and 1950s, and still in effect, amounts to a confused and refractory response to child placement and child service. The metropolitan model which influenced policy development, is based on western norms of childhood, which identify the biological family as the best environment for children. Where the biological family is not available, the state may sanction alternative arrangements through the legal process. These norms are reflected in the proposal to regulate child placement under the Adoption Ordinance and Employment Act, and in the concomitant distinction made between children living with their parents and those living with unrelated families. But at the same time there was uncertainty in defining the nature of child placements with other families. As a basic principle placements could be treated as fostering and not employment, so long as they conformed to custodianship provisions. On the other hand, it was recognised that placements could involve domestic (and other) work, and conditions of service were laid down. Relationships which did not conform to state monitoring requirements, those which remained entirely informal, were excluded

in this approach.

The confusion was increased by the failure to implement much of the legislation, including the Employment Regulations, which established a minimum age of employment, and the custodianship provisions of the Adoption Ordinance. As a result, I found that few of the informants that I spoke to knew what the minimum age was, and the possibility of custodianship was never mentioned in the juvenile courts researched.

This confusion and lack of implementation reflects the difficulty of addressing quasi adoption through the legislative model established. The model demands the application of western norms, most significantly concepts of family responsibility, to an informal practice in which children were not integrated as family members, and where children might be employed, thus mixing the characteristics of the public and private spheres. Further, I would suggest that existing policies on quasi adoption represent not synthesis or syncretisation of local and external ontologies, but rather involve the embedding of a process of exclusion in which local perspectives have limited influence in the development of child related policies. I will explore this idea further in the next chapter in which I consider current policy debates on child placement and domestic service.

## **Chapter 4.**

### **The Contemporary Debate in Sri Lanka.**

#### **Images of Children: Children and Child Domestic Service in the 1990s.**

In the last chapter the focus was on the role of law in the creation and consolidation of the model of child placement and child work, around the time that Sri Lanka gained independence. The role of law remains a concern in this chapter. In addition, I will once again be discussing the relation between what I will now call international, rather than metropolitan, and national models of child placement, this time in the context of what is widely accepted by many theorists as the increasingly intensive interplay of ideas in global relations.

At the centre of my discussion is what I will suggest is a reconfiguration of ideas about child domestic service in Sri Lanka. Attitudes to child placement and work seem to be in a process of change, and the question arises as to how this change can be conceptualised. Does reconfiguration involve the relativisation proposed by Robertson in his model of global interactions? Or can it be more accurately described in Appadurai's terms of disjuncture and conflict? Equally, is it an inclusive or exclusive process?

I will begin to consider these questions by discussing the image of children in Sri Lanka, specifically the way that they are portrayed in the English language media. In “Policing the Crisis” Hall (et al) argue that the media “in the ‘last instance’ ...*reproduce the definitions of the powerful* ...” (1978: 57 italics in original). To support this argument the authors offer a Gramscian analysis of the social role of newspapers. It is suggested that the media is involved in a process of production and reproduction of social meaning. This is achieved by transforming “official” pronouncements on social events and groups into a public idiom charged with supposed shared values. As a result, the argument continues, the media perpetuate and reinforce the dominant value system that underpins class hegemony.

I would resist the class determinism of this analysis. Appadurai’s concept of “mediascapes” is perhaps more persuasive (1990: 299). He argues that various media provide a complex repertoire of images which inform the collective (and individual) imaginings of global actors. In this analysis the connection between the powerful and the production of powerful images is less direct and predictable, but it does not preclude attempts by the state or intellectuals to manipulate or challenge ideas of children. Nonetheless, Hall et al provide an interesting perspective from which to begin to examine ideas of child domestic service in Sri Lanka. Are the media disseminating a new ideology of child work? If so, precisely what is that ideology, what is its source and what role does it play? To address these questions I will start with a brief account of two recent and well publicised

court cases involving child servants “Hiranthi” and “Padma”.

“Hiranthi’s” case hit the headlines in September 1993. She was an 11 year old girl, who alleged that she had been raped at least once by her employer, a retired police officer. A police prosecution was begun based on these allegations, but abruptly discontinued following the intervention of the Attorney General. After protests the case was reopened, but before it could come to trial the accused died of a heart attack.

Newspaper coverage of Hiranthi’s story concentrated on the controversy provoked by the Attorney General, and centred on concerns about interference with the judicial process, and the arbitrary lack of justice for Hiranthi. Inevitably, state legal discourse framed debate about the case. The Attorney General and his spokesmen argued that there had been insufficient evidence to bring the case; that the child had no corroborating evidence and contradicted herself; her complaint was unnecessarily delayed; and in any event witnesses had suggested that she was already sexually experienced. Opposing arguments challenged these grounds for dismissing the case. It was said that the Attorney General had no power to intervene; a rape victim did not have to have her story corroborated; and the judicial process should offer special protection to children.

Ideas about child sexuality were raised as part of these arguments. The Attorney General’s suggestion that Hiranthi was sexually experienced (or abused) was made



at a press conference (Daily News 15.10.1993<sup>1</sup>). This was followed up by an apologist who argued that all rape allegations are unreliable and that child witnesses were particularly capable of dishonesty. Further it seemed that Hiranthi was a child who had “ ‘eaten the world and drunk the water’ meaning that she was matured far beyond her age” (Island 7.11.1993). On the other hand an editorial in the Island newspaper rejected the portrayed of Hiranthi as “a previously sexually experienced Lolita”, and the rival English paper, the Daily News echoed this position in another editorial: “...it is clear that the child concerned has had sexual relations under whatever circumstances. This aspect of the matter raises the frightening possibility of other young children being at risk.” (Island 27.10.1993; Daily News 27.10.1993). In other words Hiranthi was either sexually vulnerable or unnaturally precocious.

The editorial in the Daily News also described child servants as “slaves”, and suggested that “too many” of their employers ill treated them “keeping them in rags and barely feeding them.” Furthermore, the editorial argued, “few of even the good employers send their children to school” and the matter of whether a child is better off with a good employer than at home “is a highly debateable question.”

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The Daily News and the Island are the two main daily English language papers in Sri Lanka. The Daily News tends to represent the political position of the (current) opposition, while the Island maintains a pro government line. The Sunday Leader and the Sunday Times (mentioned below) are weekly papers, both with an opposition orientation.

The Island editorial was equally critical of child domestic service, commenting that Hiranthi's situation was "to most people a symbol of the injustice daily meted out to children who are employed in the households of our pious upper middle classes."

Similar criticisms of employers were made in Padma's story, which was introduced with the headline "Police rescue child servant tied to mistress's bed in chains" (Island 28.3.1995). Padma had been found during a police search of Mrs "Kalutara's" a house in a suburb of Colombo, following several complaints by neighbours. After the police intervention, court proceedings were started. Press coverage focussed on the proceedings and continued for two or three months, but interest faded after the case was adjourned until December 1995, and (once again), the death of the accused before the case came to trial (Goonesekere interview 5.6. 1996).

The fact that Padma was a *child* servant is at the centre of press coverage, and of the court case itself. The defence argued during the proceedings that Padma was 21, while newspapers variously described her as between 10 and 12 years old. In strictly legal terms Padma's age should have been irrelevant. Mrs Kalutara was to be charged with cruel and inhuman treatment which is not an age related offence. However Padma's age was actually crucial to the accounts of her story, because if aged 10 or 12 she could be categorised as a *child* domestic servant, and understood accordingly.

Having taken the position that Padma was a child, the newspapers treated her experiences as abnormal and contrary to childhood. In fact she is said to have lost her childhood, and to have been condemned to a lifetime of slavery until rescued by the police. “She has never been to school, never been home for the New Year and has never had a dress to wear. Chocolates, sweets or any other type of delectable which delights a child’s tastebuds has [sic] never come Padma’s way.” (Sunday Leader 2.4.1995). Padma herself is quoted as saying that she was caned by Mrs Kalutara, chained to the bed when visitors came, and only had kitchen scraps to eat. She was not only not sent to school, she was given “an unending line of chores to perform” and at night had only the “cold hard cement floor for her bed...”. (Ibid.)

Press reports described Mrs Kalutara in equally emotive terms; she was “inhuman”, “heartless” and with a “forbidding aspect”. Clearly Mrs Kalutara was no mother substitute, a situation made worse by the fact that she should have known better as a middle class school teacher.

If Hiranthi’s case raised the spectre of sexual abuse, press coverage of Padma’s story suggests that she was comprehensively physically and mentally abused and denied an education. Significantly, this understanding is presented despite a comment by the magistrate, who said, having spoken to Padma in chambers, that “...that the child had not been ill treated by the suspect...” (Daily News 10.4.1995). In addition, both Padma and Hiranthi’s stories are used to suggest that such abuse

is *not unusual*. All the newspaper reports treat abuse of child servants as an incontrovertible and common occurrence, as the previously quoted comment in the Island suggests “...to most people [Hiranthi’s situation is] a symbol of the injustice daily meted out to children who are employed in the households of our pious upper middle classes.” Further, as this quotation also suggests, the implication is that there is a shared understanding that child domestic service involves abuse.

In fact, the stories of Padma and Hiranthi, their prominence and treatment in the press, indicate that there *has* been a shift in perspective in the configuration of child placement. Although there continues to be a recognition that children can be placed with considerate families, there is no longer a suggestion that some children are living in second homes. The relationship between children and receiving adults is treated as exploitative, as a work relationship. Under legislation passed in the 1940s and 1950s there was, as already mentioned, only a limited expectation that such children servants would attend school, particularly in the absence of compulsory education regulations. In contrast the failure to educate children is taken, in the discussion of Padma’s situation, to be an indicator of exploitation. Children placed with other families are portrayed as vulnerable to a wide variety of abuse, at the hands not of patrons, but of “heartless” employers. They are children who have lost their childhood.

A key concern in this approach to child domestic service, which mirrors the international model identified in Chapter 2, is that these children are not living

with their families, or with a substitute family. It is from this concern that the other concerns about child placement flow. As in the west, fears about the breakdown of the family are regularly expressed in the English language press in Sri Lanka. The placement of children in other families is just one manifestation of these fears. Others include the apparent rise of boy child prostitution in Sri Lanka and the increasing migration of women (mothers) to the Middle East for jobs. Although both these issues are understood to be a problem internationally (for instance Sri Lanka is described as being caught up in a “world child sex wave” (Sunday Times 25.8.1996)), they also raise concerns about the effects of social change on Sri Lankan society.

For instance, cases involving allegations of child prostitution have received considerable publicity over the last six or seven years. The extent of the problem is never clear (an estimate of 30,000 child prostitutes is often settled upon), but a series of arrests of foreigners for the abuse of children have helped to maintain high levels of concern. The same sort of ideas tend to emerge in the press coverage of these arrests, with a focus on foreigners who come to Sri Lanka to use and abuse children. The sort of abuse catalogued tends to contribute to the idea of corruption, since it generally involves both adults having sex with children, and even more unnaturally, men having sex with boys. The children are presented as victims, but also as attracted by the baubles offered to them by the foreigners, who exploit the burgeoning materialism of Sri Lankan youth through their superior buying power.

Materialism is also an issue in the representation of women who go to work in the Middle East. Although considerable sympathy is expressed in the press for the abuse suffered by such women, and (unlike child domestic workers) demands made that labour rights are extended to them, there is also an idea that their migration is governed by a misguided materialism. Not only are the women vulnerable to abuse by unfeeling foreign employers, but they are also absenting themselves from their families, leaving “their greater treasures behind” (Sunday Leader 4.8.1996).

Both child prostitution and job migration are taken to represent the breakdown of family values in press reports. It is suggested that the women who leave “their greater treasures behind”, find that their families fall apart in their absence.

Husbands squander the money sent home, children are neglected and abused, and become in their turn neglectful and abusive parents. Bad parenting is also seen as a significant factor in the rise of child prostitution. Child prostitutes are portrayed as coming from broken homes, or as having parents who neglect them, leaving them to their own devices, or who turn a blind eye, or even support the prostitution of their sons, because boys cannot get pregnant.

The solution to this disturbing picture of family breakdown, according to the English language press, is greater moral responsibility being taken by parents for their children. In the words of one memorable headline (which generated correspondence) “Children need love not meatballs and TV” (Daily News

31.5.1995). Parents should protect their children from the materialism which encourages adults to seek jobs in the Middle East and children to act as prostitutes in return for “baubles”. These requirements can be couched in the press in terms which evoke Obeyesekere’s Protestant Buddhism, mentioned in the last chapter. Parents are, for example, expected to be married; children are seen to owe their parents respect; parents equally have a responsibility of care to give their children an appropriate upbringing.

This discussion of family values takes place in the context of chronic economic and social uncertainty. After years of import substitution, the United National Party on its return to power in 1977 reversed the trend, and introduced policies designed to facilitate a market economy. Subsequently food and welfare policies have been progressively eroded as part of an attempt to become yet another Asian Tiger. These policies have been accompanied by the rise in temporary migration to the Middle East. By 1993 migrant workers were said to be contributing 30.6 billion rupees to the economy, second only to the garment industry (Sunday Times 30.4.1995), a statistic which suggests the uncomfortable possibility that absent mothers are vital to the emerging economic Tiger.

The attempt to restructure the economy has been badly undermined by the impact of a long running civil conflict, which has been more than an economic drain, creating a backdrop in which value systems as a whole seem to be under threat. Civil war erupted in 1971 with the JVP (Janatha Vimukthi Peramuna), a youth

uprising driven by left wing ideology, and described by K.M. de Silva as “the first instance of tension between generations becoming military conflict on a national scale” (1981: 541). The revolt was put down by the government, but a second more acute episode followed between 1987 to 1989. Ethnic tensions, which had been simmering since before independence, also developed into full scale war. Consequently there have been periods in which “civil society evaporated”, particularly during the second JVP uprising, when the south west of the country suffered from extremes of violence, disappearances, and torture (Bastiampillai 1995: 51).

The ethnic conflict between Tamil guerillas (the LTTE) and the government has also been extremely vicious. Tamil groups always feared that they would suffer discrimination when political power passed to the Sinhala majority. These fears were crystallised by the Official Language Act of 1956 which made Sinhala the only official language of the country, effectively closing off jobs in the public service (and the courts) to those (Tamils) who could not speak Sinhala. This provision was given constitutional effect when the constitution was revised in 1972 and 1978 and only reversed in 1987. The language policy, and others like it, seemed to confirm the second class status of the Tamil minority. At the same time Sinhala dominated land settlement in the north and east of Sri Lanka were felt as a threat to the Tamil majority in those parts of the country (Tambiah 1992: 69). In 1976 Tamil groups issued the Vaddukoddai Resolution calling for an independent Tamil homeland. Conflict followed. Although there have been cease-fires,



including a peace accord brokered by the Indian government in 1987, the war continues unabated, with Tamil guerillas ostensibly seeking freedom from discrimination, and self determination, and the Sinhala led government attempting to maintain the country's integrity and to resist fragmentation. In the meantime thousands of soldiers and civilians have died, thousands more in the north and east have been forced into refugee camps, and bomb blasts and security alerts have become a way of life in the capital<sup>2</sup>.

The effect of this continuing conflict has been to polarise Sri Lankan society, creating a gulf between the two communities, even where they live in close proximity, as in Colombo. It is a gulf exemplified by headlines such as "Sinhala Youth saves Tamil Woman" relating to the story of a woman saved from drowning by a fisherman (Island 21.2.1995). On the one hand Tamil men are vulnerable to being detained by the police under emergency legislation, during periodic sweeps of Colombo<sup>3</sup>. On the other hand the Sinhala majority are vulnerable to outbreaks

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As an example in 1995 there were five bomb blasts in Colombo (including one at an oil depot) in which 59 people died, and in 1996 two separate bomb blasts killed a total of 150 people. More recently, on 18 December 1999, 23 people died during an attempt to assassinate the President, Chandrika Kumaratunga, who lost an eye as a result of the attack.

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For instance, in the two days following the attack on the oil depot in Colombo in October 1995, a Tamil newspaper reported that 1,500 Tamils were detained in the

of violence and the bomb attacks orchestrated by the LTTE.

This context is important when considering the media discussion of family values. The portrayal of children and families as at risk is, I suggest an image current in international discourse. International discourse (ideas derived from a particular locality as argued above) set the terms by which the discussion is framed. At the same time though, local ideas, ideas of polarisation, discrimination and fragmentation are also evident.

As I mentioned in Chapter 3, Kapferer argues that fears of social fragmentation are very real in the Buddhist ontology (Kapferer 1988). In this ontology the moral universe is hierarchical<sup>4</sup>. It contains Gods, Godlings, demons and malignant spirits, with men and women placed in between these two extremes. All members of this hierarchy may rise or fall according to the motive force of *karma*. *Karma* refers to the status and characteristics of an individual, which are related to behaviour in previous lives. If one has sinned, one will be reborn lower down the hierarchy; if one has acquired merit, then one will rise. Movement down the hierarchy is accompanied by fragmentation and an associated pollution.

The moral order of the universe is also reflected in the social order of society.

Indeed it is the social order of society (Geertz 1983 Chapter 8; Gombrich and

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capital (Virakesari 23 and 24.10.1995).

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For a detailed discussion see Gombrich and Obeyesekere (1988).

Obeyesekere 1988). This idea, that society is naturally morally ordered, is important in the way that social order is conceptualised. Essentially, if one is materially successful, or born a man rather than a woman, then this is a reflection of one's position in the prevailing moral as well as social order. Equally Kapferer argues that the political organisation of the state reflects the natural moral order, involving a demand that it should remain whole and uncontaminated by fragmentation (1988: Chapter 1). It is this moral impetus towards a social integrity which provides a rationale for Sinhala resistance to demands for devolution and federalism by the Tamil Tigers. It is arguably also behind concerns to maintain the integrity of social structures such as the family.

This brings me to a pivotal point in my thesis: the relation between international and local ideas in shaping concepts of children and family in Sri Lanka. To elaborate slightly I need to refer again to the work of Appadurai and Robertson.

A key component of Appadurai's analysis is the importance of context in understanding international interactions. The imagined worlds of his global actors (which include nations, states, families and individuals) are assembled from "deeply perspectival constructs", in which the homogenising "master narratives of the Enlightenment" lose internal coherence, and become "indigenised" by that nation, state, or person (1990: 296, 300). As a result, the career of ideas as they are disseminated across the world is unpredictable; one has the vision of a gigantic game of chinese whispers in which ideas are constituted and reconstituted as they

are passed from participant to participant. Yet even Appadurai would not suggest that international interaction is as completely unstructured as this vision suggests, for instance he would accept that *a* point of reference remains the “master narratives”. He argues that states struggle to control the homogenising influences of these narratives, using them to create heterogenous dialogues of national identity with which to challenge the self determinist claims of separatist groups (1990: 303). Applying this analysis to the discussion of family values in Sri Lanka, it is possible to argue that as in the 1930s (Chapter 3) local, state, imperatives have been significant in the stress placed upon children and family in the public discourse. Variations on the theme of children as “our future”, to be provided for, and protected by, the Sri Lankan state, serve to strengthen ideas of social stability and national identity, in the face of Tamil claims for an independent homeland within Sri Lanka.

If, simply put, Appadurai argues that the local shapes the global, in international interactions, an equally simplified summary would suggest that in Robertson’s view the global shapes the local. I admit that this is an oversimplification of the positions taken by Appadurai and Robertson, but I think it is one that captures a difference in emphasis between the two. For while Robertson sees the interpenetration of universalism and particularism as the central dynamic of the globalising process, he also argues that the process is structured by the four “elemental points of reference” (1992: 104) I mentioned in Chapter 1. That is, in Robertson’s terms, it is global ideas (and again by this I understand universalised

western ideas) that structure ways of thinking about the world (1992: 175).

In the rest of this chapter I look in more detail at current representations of child service in Sri Lanka, and the interplay of international discourse and local ideas. I will argue, following Robertson, that while local imperatives may have contributed to the generation of the debate on children and family, it is the international discourse rather than local ideas that tend to set the terms of that debate in Sri Lanka, ideas that do not yet seem to have lost their “internal coherence”. It is ideas of children and rights found in the international discourse that are used to identify areas of concern, and to develop responses to those concerns, as the media debate discussed above suggests. I am not though arguing, with Robertson, that there is a trend towards unicity. As I will discuss in my field work chapters, alternative perspectives are significant in the implementation, if not the development, of child related policies in Sri Lanka.

### **Victims of Labour: the Child in Other Families.**

The direction of government policy has been signalled in a series of international policy statements. Sri Lanka has been involved in several SAARC statements opposing child labour; it endorsed the Global Plan of Action for Children; and in July 1991 it ratified the CRC without reservation (Bisset-Johnson 1994). This international discourse has been translated into national policy statements, the most significant of which are the National Plan of Action with its companion

document “A Profile of Children in Sri Lanka” (both 1991) and the Children’s Charter (1992a). Government policies on children are also elaborated in the 1994 report to the Committee on the Rights of the Child in Geneva (Marga Institute 1994).

Policy documents consistently describe child workers as children in difficult circumstances, following the pattern set by the Global Plan of Action and the Convention. Child domestic servants are placed firmly within this category, indeed they appear to dominate it. For instance the Plan of Action suggests that of the total of 500,000 working children in Sri Lanka “A considerable number is [sic] in domestic service in middle class homes” (1991a: 4). This suggestion was echoed by the report to the Committee on the Rights of the Child (Marga Institute 1994: 54) and reiterated by the Minister of Labour in a speech to the ILO in 1996 (Sunday Leader 16.6 1996).

The 1991 Plan of Action is a comprehensive policy statement which sets out government objectives for children in the short and medium term. In the Plan child labour and abuse are linked. Section 3.3 deals with them together, and states that the basic objective is to eradicate both problems in Sri Lanka. The policies set out at this point, including the registration of household inmates and of child custody, suggest that it is a specific form of child labour, child domestic service in other people’s families, which is the main object of concern of this section. Similarly the report to the Committee on the Rights of the Child treats child domestic service as

an example of the types of abuse covered by article 19 of the CRC, suggesting that there needs to be “a searching evaluation of attitudes, practices and values in various situations in which adults have control and authority over children” (Marga Institute 1994:16).

As in Hiranthi’s case, official statements tend to link child domestic service with sexual abuse. For girls at least, child service is seen as one step down the slippery slope towards prostitution. This connection had already been made in research studies in 1991 (Goonesekere 1993b and 1996) and was reiterated by the then Probation Commissioner, Padma Ranasinghe in 1995 when she said “A survey of prostitutes in rehabilitation centres...revealed that over 60% had taken to prostitution after being subjected to sexual abuse in the households where they had worked as domestic servants.” (Press statement Daily News 12.5.1995). The theme was taken up in parliament during the debate on amendment of the Penal Code on sexual offences (Sri Lankan Government Hansard 1995a) .

The connection between domestic service and abuse was also made during discussions at an ILO and Ministry of Labour IPEC (International Programme on the Elimination of Child Labour) workshop held in Colombo in September 1996<sup>5</sup>. The workshop was a first step towards a collaboration between the ILO and the government intended to put flesh on the bones of the general policies set out in the Plan of Action, and to develop existing strategies for dealing with child abuse, by

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I attended as an observer.

creating a comprehensive programme for the elimination of child labour, following the IPEC model.

IPEC literature suggests that the intention of the programme is to adopt a flexible approach to the question of child labour. “Child labour is a complex problem for which there is no magic solution ...Any programme must ... be both flexible and selective and work at different levels with multiple interventions” (IPEC Programme Document ILO nd: 9). At the same time though, IPEC is premised on the understanding that child labour is a problem and that strategies should be developed to eliminate it. In addition the proposed response to the presupposed problem is envisaged in terms of a (donor friendly) logical framework with target groups, indicators, inputs outputs and programme activities. This sort of approach to individual projects and country policies was advocated at the Colombo ILO workshop in 1996. In participating in IPEC then, the Ministry of Labour effectively maintained its acceptance of the current international formulation of child labour as a problem.

The workshop was attended by a generous cross section of government officials, trade unionists, academics and NGO workers, all concerned with child labour in Sri Lanka. As such it gives a fairly good indication of the nature of the debate on child labour among activists and policy makers at least, children and their families being notably absent. It did not reach any definitive conclusions on the nature of child work in Sri Lanka but discussions over the three days indicated a trend in the



configuration of the problem. Differences between two trade unions, the CWC and the SLNSS, on the question of child work highlight two aspects of the understandings expressed.

The CWC had prepared a comprehensive report on the dimensions of child work in the tea plantations (Sandrasekera 1996). This report stressed that children did not work on the plantations themselves, but outside as domestic workers and in small businesses and restaurants. The SLNSS report came up with different findings. It confirmed that children were not actually employed on rubber plantations, in the sense that they were paid or even acknowledged by the management. However it also suggested that children did work unofficially to help their parents meet production targets, for instance by collecting latex before it coagulated. As the report pointed out this meant that the rubber companies got both free labour and a trained workforce for future employment (Devendra 1996).

The suggestion that children did this kind of unofficial work was strongly rejected by the representative of the CWC at the workshop, who asserted that children were not needed in the collection of latex. This position of the CWC suggests a reluctance to acknowledge the existence of child work in part of the export sector. This is perhaps not surprising in view of the possibility that western importers could try to use the issue to impose trade sanctions on Sri Lankan companies. Such a concern was expressed by a representative of the Employers Federation who argued that child labour was not used by her members in the coir production

industry, but said that it was widespread amongst small scale coir producers.

At the same time as de-emphasising the work of children in the plantation sector, the differences between the CWC and the SLNSS raised an ambivalence about the nature of child work itself. Does child work include work with the family? One of the NGO participants rehearsed the opinion that children are socialised by a gradual introduction to work under the “protection and supervision” of their parents. But as one Sri Lankan academic commented in a recent paper, exploitation can also occur in the family and the nature of family work should be defined (de Soysa nd2). This view was echoed by a representative of UNICEF at the ILO workshop, however the legislative proposals finalised on the third day made no mention of family work.

One area where there was widespread consensus was that, unlike family work, the practice of placing children to live and work in other families, referred to throughout as domestic service, was a problem in Sri Lanka.

The CWC report suggested that children were going out of the plantations to be domestic servants. There were similar findings in a study prepared by Plan International which was represented at the workshop. Overviews presented by the Ministry of Labour, Professor Goonesekere of Colombo University and the previous probation commissioner, all reiterated the point that child domestic service was the major child labour problem in Sri Lanka. Not only was it a

problem, but there was also general agreement that it was the most abusive form of child labour, foreshadowing the position taken at the international conferences in Amsterdam and Oslo in 1997. Not only was there a strong identification of child domestic service as the problem, but there was also a tendency to use domestic service as a shorthand for child labour to the exclusion of other activities.

The unacceptable nature of domestic service was also stressed. For example, in her overview Professor Goonesekere suggested that it was “the most abusive form of child labour in Sri Lanka ...Since they live in they are totally at the mercy of their employers and employers children.” Her report outlines the extent of abuse suffered by such children “... beaten, burnt, maimed, sexually abused and even killed...” as evidenced by police records, newspapers, seminar reports and court cases (1996). A similar theme is taken up in the CWC report, which suggested that “in the domestic service not only is child labour exploited but the children are physically, emotionally and even sexually abused. It is estimated that around 100,000 children are being so exploited.” (1996: 11).

A final example of the consistency in understanding child domestic service comes from the presentation of Dr Weeramunda (also from Colombo University), which was based on research done in 1983 (Weeramunda 1983). Although stressing the complexities of the causes and effects of child work in a wide variety of occupations, Weeramunda returned to the stereotype of child servants as a special category of victim. His report reproduced interviews with several child domestic

servants. One child was clearly very badly treated and broke down during the interview. Four other children though were relatively happy with their situation. Nonetheless Weeramunda suggests that “For every domestic who gets a good deal there is another whose lot appears to be just the opposite.” (1983: 74). Only the position of children working in fishing camps (a practice apparently now discontinued because of the civil war) is “perhaps more unbearable than the lot of domestic servants.” (1983: 28).

It is interesting that this idea of child placement and domestic service seems to have been held by many among the wide range of activists who attended the ILO workshop. I have already mentioned Appadurai’s argument that the state attempts to control the homogenising influences of global discourses. The other side of the argument is the attempt by forces of heterogeneity, local activists, separatists, terrorists, to challenge the state’s use and interpretation of these discourses. It is an argument that has resonances with Baxi’s analysis of the potential of rights. As I mentioned in Chapter 1, he suggests that in contemporary rights the local is the “crucial locus of struggle” (1998: 151) in which can be generated a profusion of challenges and counter- challenges which work to accommodate difference and to undermine existing power relations. Although this is an attractive picture, it is one that does not seem to be applicable, within the Sri Lankan policy debate on children and family at least. The imagined worlds of Sri Lankan child right activists seem to share the same views as the “imagined worlds of the “official mind” in this instance, rather than “subverting them” (Appadurai 1996: 33).

This congruity of perspectives is reinforced by the debate in the press on family values mentioned above. The one seems to feed into the other, as predicted by Hall et al. Newspaper reports refer to policy proposals, for instance extensive coverage was given in 1995 to amendments to the Penal Code intended to punish the sexual abuse of children. The reports of Professor Goonesekere and the CWC, in turn, refer to press reports to confirm their representation of the abusive nature of child domestic service, before going on to recommend that action be taken against abusers (Goonesekere 1996: 16, 25; Sandrasekera 1996: 11). Equally concerns about family breakdown and inadequate parenting, expressed in the press, emerge in the policy debate, and it is these that I now want to look at a little more closely.

### **Child Placement and Domestic Service: the Family as a Problem.**

I will use the work of two leading academics, Professor Goonesekere and Dr Weeramunda, to focus my analysis of the way the family is represented in the policy debate about child domestic service. Both Professor Goonesekere and Dr Weeramunda spoke at the ILO workshop, and as already mentioned, both condemn the practice of child domestic service, but they take different positions in respect of the nature and dynamics of the family and child service.

Weeramunda's research, although done in 1983, was the most detailed piece of research on child labour available to the ILO workshop. It involved the "non random" "accidental" survey of 188 children (including children placed with other

families), and generated fairly detailed information on the nature of families whose children worked. They were, he found, families with very low incomes, even where both parents worked. The average monthly wage was 600 rupees, which as Weeramunda pointed out was (in 1983), “quite inadequate to even feed a family of four members”. Most children’s fathers worked (90%), but of those who did not, the majority were described as disabled. In addition Weeramunda suggested that some fathers “were not interested and indicat[ed] sheer mental and physical exhaustion.” (Weeramunda 1996).

The majority of children, then, were not from broken homes, but lived in nuclear families facing chronic poverty. Loss of a parent, parental addiction were found to be strong contributory factors pushing children towards work, as was lack of access to, or (less often) interest in, education. Parents certainly encouraged their children to work, but at the same time Weeramunda suggests that many expressed emotions, ranging from sorrow to fatalism, that their children had to work. Yet others argued that their children were better off employed than at school, which was unaffordable for many in any event.

Weeramunda concludes that all working children, including children in other families, are exploited, and that child work itself should be eradicated. However his analysis gives a flavour of the complicated nature of child work. It is not in his view simply a case of children from broken homes drifting into exploitation and crime. Most children had functioning families; some parents regretted the

situation, others justified sending their children to work. Most importantly, poverty was the overwhelming factor which led to children to work.

If Weeramunda is generally sympathetic to families who place their children in other families, he is caustic about those families who receive them. He comments on the ways that employers justify child placement in terms of patronage: “It is ...the kind of rationalisation that justifies all forms of child exploitation...

Somewhere in the minds of such people, all these discordant notes have been reconciled and harmonised so that they could go to the temple like good and pious Buddhists.” (1983: 78). But in contradiction to the above, Weeramunda also suggests that safeguards for children do exist within the wider cultural framework. In the case of all patron- client relationships (including domestic servants) he suggests “The entire relationship appears to be modelled on the relations ideally expected between father and child and is to that extent governed by values underlying the larger cultural system. As such, it is difficult to say or conclude categorically whether such relationships are truly exploitative or not since the contract is regulated by duties and responsibilities that apply to both parties involved.” (1983: 108).

Some of the values “underlying the larger cultural system” have been referred to in the first part of this chapter, and in Chapter 3. As I mentioned, in the Buddhist perspective the moral universe is hierarchical, a hierarchy within which it is possible to rise or fall dependent on the motive force of *karma*. The only way to

escape the cycle of rebirth within the hierarchy is to achieve nirvana, that is the extinction of desire. The absence of desire (including the absence of desire for the absence of desire), as a basic Buddhist principle, is reflected in Sinhala society, in the positive valuation given to social restraint and detachment, noted in particular by Spencer in his research (1990a). The social order also reflects the overarching moral order, one's place in society corresponds with one's position in the moral order.

Combining these ideas of hierarchy and social restraint are expectations of the way that groups within the hierarchy, for instance the rich and the poor, should interact. The research of Risseuw (1991) and Spencer, carried out almost contemporaneously in two distinct Sinhala communities (respectively 1977-8 in "Mahagoda", and 1982 - 84 in "Tenna") found that in both there were strong expectations that social relations should, on the surface at least, preserve the impression of harmony and friendship, although the authors differ in their analysis of the reality of this social surface. However a significant point for my analysis, which is raised by both pieces of work, is that social order is conceptualised and portrayed in terms of positive relationships in which generosity (patronage) is shown by those higher up the hierarchy (the rich, elders) and deference is expressed by those lower down (the poor, children). It is this sort of carefully balanced relationship that Weeramunda is referring to, when he talks about duties and responsibilities that apply to both parties, in patron-client, adult-child relationships.



Goonesekere also deals with the way child placement is rationalised in her analysis. She agrees that it relies on an idea of a beneficial form of patronage which has long been widespread in Sri Lankan society. However she argues that it is no longer valid. Taking DB Jayatilika's 1941 statement, that the Adoption Ordinance was designed to protect (some) children placed in quasi adoption (see Chapter 3), Goonesekere states that already in the 1930s the practice was degenerating, and that now it is inherently exploitative. She argues that the practice reinforces unequal social relations in which there is apparently no longer room for a positive system of values identified by Weeramunda. Instead the child is seen "as devoid of identity" and placed with a family "exclusively to provide menial services." (1993b: 8)

For Goonesekere child placement is characterised as simply an economic relationship. Through this association, it becomes of necessity exploitative, not only of the individual child, but also in Goonesekere's terms, of social relationships in general. Responsible receiving families are treated as the exception rather than the rule, and even then are barely adequate substitutes for a child's biological family "...a kind employer may, in some instances provide the child domestic with his/her physical and emotional needs, in an atmosphere of caring, despite the feudal service relationship." (1993b: 7).

This argument seems to operate firmly within the parameters set by an international model of childhood. There is a juxtaposition of modern and

traditional, with the traditional irrevocably changed by and within modern society. As a result child placement becomes understood as a form of work, child domestic service, which means that it can only be seen as exploitative, with the child put in an environment that is unlikely to meet his or her needs.

Goonesekere also takes issue with Weeramunda's suggestion that it is poverty that is the major factor in pushing children towards work. She argues that it is an oversimplification to focus on economic reasons for child labour alone and suggests that socio-cultural reasons are also at work, using the situation in the plantation areas of Sri Lanka to illustrate her statement. As I mentioned in the last chapter, the welfare system in these areas has been neglected in the decades following independence. In the plantation sector the social indicators for women have been consistently low, with low levels of literacy, and high levels of malnutrition and health problems. These, Goonesekere suggests, are strongly associated with child labour. By implication then, the socio-cultural factors to which Goonesekere refers are certainly ignorance reflected by poor literacy, but also the child related values prevailing in the plantation culture (1996: 22).

By contrast she suggests, low income parents in other regions of the country, with higher social indicators, tend to resist sending their children out to work. This is apparently equally true of families from rural areas outside Colombo, and of families who live in urban slums (1993b: 7; 1996: 23-24). In both cases, Goonesekere argues, "positive values on family responsibility and child care, and

the unwillingness of [these families] to send children and girls in particular out to work” have operated to protect children from domestic employment (1993b: 7). Presumably these are not the values referred to by Weeramunda. She agrees though that some families from these areas do send children out to work, but attributes this practice to “low income families that are disfunctioning and in crisis”, particularly single mothers (1993b: 7). Further, recent developments, including the migration of women to jobs in the Middle East and the displacement of families by the civil war, have accentuated the problem of family disfunction (1996: 25).

In making these arguments Goonesekere disputes Weeramunda’s analysis, which links rather than separates economic problems from socio-cultural factors. In his view parents rely out of necessity on child labour; a necessity created out of a lack of remuneration compounded by poor education, ill health and a growing alienation. Goonesekere strongly rejects this position arguing instead that socio-cultural factors, together with disfunction, are the basis of child labour. The justification for adopting this analysis is revealed in Goonesekere’s response to Weeramunda: if poverty is linked to child labour this will provide the government with an excuse not to act, since it could be said that there was nothing to be done until poverty is eradicated.

In any event her argument leads Goonesekere to characterise sending families as problems in themselves; families who fail to discharge their parental

responsibilities adequately. This failure has been disconnected from social and economic structures of poverty, allowing “problem” families to become policy targets, as opposed to designing strategies to address social inequality as a whole. Equally her analysis excludes alternative accounts of child placement, so that it is treated as simply abusive, thus confirming the legitimacy of policy interventions. As I suggest below, it is this approach, rather than that of Weeramunda, for instance, that has proved influential in developing child related policies in Sri Lanka in the 1990s.

### **Child Placement and Domestic Service: the Family as a Solution.**

The family is already a target for intervention at international policy level, with the CRC as a primary example of this tendency (see articles 3, 5, 18 and 27). In these policies the family is given considerable responsibility in the joint project of nurturing and socialising children, with the state taking on a defined and supportive role. A similar, but not identical, trend can be found in Sri Lankan policies.

Article 5 of the CRC was explicitly intended to limit state intervention into the private sphere of family life (Detrick 1992: 159); while articles 18 and 27 place extensive responsibility on the family to provide “the conditions of living necessary for the child’s development.” (Detrick 1992). The Sri Lankan Children’s Charter, which does not have force of law, contains provisions similar to those of

the CRC. It reproduces the balance between state intervention and family privacy, but with two modifications reflecting state law principles. In the Charter, the “family” is defined by article 5 as the nuclear unit, reinforcing the primacy of parental claims against those of third parties (for example relatives or patrons)<sup>6</sup>. At the same time Charter article 19 omits any reference to *joint* parental responsibility, so that the pre-eminence of paternal power, based on locally interpreted Roman Dutch law principles, is not challenged (Goonesekere 1987; de Soysa nd1: 8).

Both these modifications tend to reinforce an image of strong (patriarchal) family power protected from external interference. But consistent with the public/ private model of society contained in the CRC, the Charter also establishes state enforced standards of parental behaviour towards children. Expanding on the general terminology of the CRC, the Charter makes it obligatory for parents to bring children up in a “proper” religious environment and to ensure that children “grow up as patriotic citizens” (articles 5 and 18). The corollary of such expectations is that parental behaviour needs to be monitored, and if parents fail to meet the standards set then they can be judged.

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Goonesekere 1987: Chapter VI, and 1994: 132; see also de Soysa 1985 and 1990. Although these commentators disagree on the extent to which a child’s best interests has been used to supersede parental and paternal rights, both would accept that judicial decisions are made within a strong patriarchal framework.

The Charter does not establish a fundamentally new approach to family policies in Sri Lanka. As family law commentators point out the courts have long been treated as having the power to supervise parents by virtue of the Roman Dutch concept of Upper Guardianship (Goonesekere 1987). This concept was given statutory form under the Children and Young Persons Ordinance. As discussed in the last chapter, Sessional Paper IX of 1935, the blue print for the ordinance, made the connection between parental behaviour and state monitoring, that reflected the discourse of British and American penal reformers. This was converted by the ordinance itself into provisions regulating the parent child relationship. The ordinance confirmed that parents, all parents, are precisely responsible for the care of their children. Parents of both child offenders, and those “in need of care or protection”, were and are expected to attend court, to be available for questioning by probation officers and to submit to external supervision through the medium of recognisances and probation orders. In protection cases parents who fail to offer appropriate care to their children can have them removed; in criminal cases parents become co-offenders with their children. This trend has been maintained in recent policy proposals. On the one hand the “family will have to play a central role” to meet the objectives set out in the national Plan of Action for Children in Sri Lanka (1991a: 2). On the other hand families which fail to perform their “legitimate role” will be targets for state intervention (see for example the recommendations of Sri Lankan Government Sessional Paper No VI of 1988, revived during the 1990s).

Although the emphasis on parental responsibility remains unchanged, there has

been a significant change in approach to child placement. As I suggested in Chapter 3, it seems unlikely when the CYPO was drafted that child placement, including the placement of children as servants, was to be treated as an example of parental failure under section 34. However the reinterpretation of good and bad parenting, in the light of international ideas, and the construction of child servants as the epitome of abuse, have combined to make children placed outside their families, and the families themselves, the legitimate targets of state intervention.

### **Enforcing the Solution.**

The strategies proposed to secure state intervention also replicate international ideas. The legislative framework, described in the last chapter, is to be given new force to reflect the shift in construction of child domestic service.

The Plan of Action (1991) identifies two main areas of reform: raising the minimum age of employment to 14, and the revival of the long dormant custodianship provisions in the Adoption Ordinance 1941. Subsequently, a Technical Committee of Experts (including lawyers and academics, such as Professor Goonesekere) took these ideas further. The Committee, which was set up under the auspices of the Children's Charter, and met in 1993, endorsed the idea of a uniform minimum age of employment, but suggested that it should be 15, consistent with the higher minimum age established by ILO No. 138 (Technical Committee nd). The Committee also recommended that the new minimum age

should be linked to compulsory education provisions, since “the importance of education in preventing child labour is well recognized by international and national experience throughout the world” (nd: 2). With regard to custodianship, the Committee proposed that *all* placements, including placements with relatives, should be registered under the ordinance, and that custodians should be made responsible for the physical care and education of the children living with them (nd: 6).

Taken together, these proposals revisit the juxtaposition of education and work, and the expectation that all placements will be formalised, both familiar from the CRC. As in deliberations over CRC article 32, paragraph 2 (a), the distinction was made between “family work” and other forms of work, with custodial children permitted to take part in “family activities” (nd: 2). The Technical Committee report also associated domestic service and abuse. It recommended that “child victims of exploitation”, should be treated as protected persons, and also argued that the Specialist Court magistrate should be given jurisdiction to deal with adults in cases of “child abuse connected with child labour” (nd: 4, 7).

In order to implement these strategies it is proposed to develop existing care and correctional services. Specialised police desks, intended to investigate crimes against women and children have already been established, and operate in all police divisions (see next chapter). In addition, the Technical Committee suggested increasing the number of probation officers by using volunteers (nd: 4). Both the



Plan of Action and the Technical Committee also stress the need to improve monitoring, co-ordination between departments, and the extension of the powers of probation to initiate proceedings in employment cases. Perhaps more significantly, the Plan of Action also recommended that the mandatory registration of households under emergency regulations, should be used to “notify” households of their duties towards children (1991a: 21).

By the end of my field work it was not clear how far these proposals would be implemented. For instance, in 1993 and again 1996 it was reported that the Technical Committee recommendations had been approved and were with the legal draftsman (Sri Lankan Government 1993; Goonesekere 1996: 57). However no legislation was passed. On the other hand, some of the recommendations made, were already operating in practice. As I discuss in the next chapter, a large number of “employment” cases were brought to the Specialist Court, involving the placement of children and adolescents in abusive and non abusive situations. The court dealt with them, despite a lack of jurisdiction. I was also aware that three of these cases had come to court because the police had used the mandatory registration process to check for child employment.

The repressive response to child work embodied, in the Plan of Action and the Technical Committee report, is in contrast to the approach adopted by the governments of India and Pakistan. For example, both countries passed legislation relatively recently (1986 and 1991 respectively) designed to regulate rather than to

eliminate child work. The Indian Child Labour Prohibition and Regulation Act sets out a minimum age of 14 for work only in some hazardous occupations and processes. Domestic service is not mentioned. The Pakistani Employment of Children Act is very similar, except that the minimum age established is 15. Despite this difference in approach, however, I would argue that all three sets of policies are operating along the same continuum, established by child rights norms. The elimination of child work remains an aspiration, what is variable is the amount of government intervention (in monitoring, enforcement and education provision) that is considered feasible.

## **Conclusion.**

There has been a change in the official construction of child servants in Sri Lanka. It has become caught up in the international condemnation of domestic service. Existing legislative structures permit the employment of children in most forms of work over the age of 12. They also set out conditions under which child servants can be employed, conditions which seem to preclude the possibility of such children attending school. More recently though, what I will refer to as the Colombo model of child service has emerged. In this model, domestic service is presented as a major problem, as inevitably abusive. The risk to the child repeatedly identified stems not simply from the fact that the child is working (otherwise all child workers would face similar risks), nor from the child being left uneducated. The risk relates to the precise situation of the child. As in the

international discourse, it is a risk that emanates from an inversion of one the major requirements of childhood, that of being brought up within a family environment. Child servants live in a family but it is the wrong sort of family, so that not only are their moral and physical development challenged, but so is the notion of the supportive environment of the family itself. It is for this reason that child service can be seen not simply as abusive, but more critically, it also reflects a breakdown in social relationships.

The Colombo model illustrates rather well Robertson's idea of relativisation, that is the that entities, collectivities, are constrained to position themselves in relation to his global points of reference, in this case rights and childhood (1992). Equally, the history of child care policies in Sri Lanka suggests that this process is not qualitatively different to that which occurred in the run up to independence, in that points of reference remain solidly western. For "global" read "metropolitan."

What both the Colombo model, and the existing legislative structures (which I will abbreviate as the "legislative" model) do, is exclude the complexity of children's lives in Sri Lanka. This tendency to exclude can perhaps best be symbolised by the lack of representation of children or their families at the ILO workshop, a forum in which the Colombo model of child service was articulated. Even limited consultation, of the sort proposed under the Worst Forms Convention (see Chapter 2) was not envisaged. What I want to do in the next chapter is to reintroduce some complexity, and look more directly at the impact these official models of child

service have on children's lives.

## **Chapter 5.**

### **Child Placement, Courts and People.**

#### **Introduction.**

In this field work chapter I reach the crux of my argument, the point at which the theoretical perspectives on children, and my analysis of them, encounter the experience of children and families in practice, in the juvenile court.

I chose the juvenile court as the location for my research, because, as I argued in Chapter 2 (following Donzelot), it is the context in which the normalising discourses of childhood - child development, child welfare, child rights- are focused and imposed on children and families. The juvenile court is a long established element in the child care policies of Sri Lanka (see Chapter 3). Originally conceived as a way of addressing an apparent rise in juvenile crime, on enactment its jurisdiction was extended to include children in need of care or protection. The court system was established in conjunction with a professionalised probation service, which together with the police and a number of children's homes, form the main components of the state child care structure. Current strategies intended to regulate or eliminate child work in Sri Lanka, mentioned in Chapter 4, propose a further extension of the powers of the juvenile court and probation department, to punish adults who abuse children

by employing them.

In the juvenile court setting I return to the questions that inspired my research: are children empowered by child rights based policies; what are the consequences for children of the implementation of these policies? By empowered I mean, in the same way as child rights proponents, the ability to act, to further one's own interests. I have already argued that, from a theoretical point of view, the empowerment delivered by child rights is bounded by the discourse itself, which operates to define individuals and to demand conformity to a set of universal norms of childhood. In the last chapter I suggested that it was this approach to childhood which dominated the policy debate in Sri Lanka. That, in Robertson's terms, global points of reference set the terms of debate, rather than suffering from an Appadurain diffusion. I also acknowledged that I oversimplified both Appadurai's and Robertson's analysis at this point. Robertson, for instance, discusses the accommodation between Japanese religious perspectives and imported religious ideas, and comments that "The 'internal' features of societies greatly affect their forms of global involvement..." (1992: 96). In the next two chapters I consider forms of involvement in the global discourse of childhood, by looking in some detail at the child process in Sri Lanka. As in previous chapters my concern is with the way that children are constructed, the extent to which children are actually empowered by such constructions; and the way in which in which these constructions relate to the international and the Colombo models of children, families and work. I will suggest that although international ideas remain important, and while they may not have lost their internal coherence, they do show signs of what might be

termed exaggeration and a loss of anchorage in a particular set of ideas.

In Sri Lanka globally influenced policy ideas on child service were translated in the 1930s, 1940s and 1950s into the legislative provisions discussed in Chapter 3. This legislative model continues to be what structures the response of the child care authorities in dealing with child service. The intention of the policy makers was to create a framework in which the informal placement of children would be regulated through registration and compulsory school attendance. The custodianship provisions of the Adoption Ordinance required the registration of all children in a household who were unrelated to the householders. These provisions did not specifically apply to child servants. Equally there was no reason why they should not be registered. However, the custodianship provisions were not implemented and compulsory education regulations were never passed, except with limited effect in estate areas (see Chapter 3). Employment legislation, on the other hand, is in effect. This prohibits the employment of children under 12, and also any form of employment “injurious” to education. At the same time it is clear from the legislation, and also from the attitudes of the drafters, that child servants need not go to school, since it is permissible for them to work a 10 hour day.

The effect of the legislative framework as it stands is to legitimate child work in the form child domestic service so long as the child is over 12. Similarly informal placements are left legitimate since the custodianship provisions were not implemented. This approach to child work and child service is in contrast to the

current international model which was discussed at some length in Chapter 2. That model may be summarised as follows. It is accepted that children have always worked, but it is argued that in the context of modern societies that work becomes exploitative because it blocks access to education. The emphasis on the importance of education means that it becomes a basic criterion for determining what amounts to exploitation, children who are not being educated are being exploited, which would apply to domestic servants as well as to children in other occupations.

Based on the perceived importance of family relationships for children and the difference between public and private spheres of activity, the current international model places increased stress on the distinction between family work and domestic service. Family work, work done in the family, while causing some concern, is not seen as a particular problem for most children. Domestic service, on the other hand, is treated as being especially abusive of children because the children concerned have left their own nurturing family environment, and are living in a household in which they are economically exploited rather than nurtured. This characterisation of child service contrasts with that of the drafters of the Employment Act 1956. At the time the Minister of Labour argued that child servants were protected because they were living in what he described as a “second home”, a position which would probably not have been accepted at the Amsterdam or Oslo Conferences in 1997. At both it was generally agreed that domestic service should be eliminated.

The third model of child service which has relevance for this chapter, is what I



described in Chapter 4 as the “Colombo” model of child service, (that is, the current model adhered to by policy makers in Colombo). I suggested that although differences of opinion were expressed about the causes of child service, strategies for addressing it, and more occasionally about the nature of child service itself, the proponents of this model were generally still operating within the framework established by the international discourse on children. There was widespread acceptance that child domestic servants were the victims of abuse and that as far as possible the practice of child service should be eliminated. It was also agreed that children should be educated and that work can have adverse effects on access to education. Many policy makers argued for the use of compulsory education provisions, possibly with penalties attached, to combat child work, and for the need to penalise families who exploit children in their care.

The Colombo model has difficulty in dealing with informal placements, where children live with “receiving families” and may or may not be employed by them. This is reflected in the tendency to describe families who receive children as “employers” whether or not the individuals concerned consider the relationship to be one of employment. Such a complication is not recognised in the international picture of child servants, but it is one with ramifications for children in informal placements in Sri Lanka. The proposed strategy is to regulate all such placements involving children under 14. How are such placements viewed in practice? What will the effects of regulation be? For instance, how will children in informal placements be distinguished from child servants? Will they be?

Again one of the fundamental preoccupations of the Colombo construction of children who work, is that working children in Sri Lanka tend to be domestic servants. If that is an approach that is followed by the child care authorities in practice, the question then arises as to how it affects children found in other occupations. Are they recognised as employees, for example as shop assistants or factory workers? If they are, are they treated as victims of economic exploitation or as contributing to the family economy? On the other hand are they grouped with child servants and seen, as servants are, to be victims of a particularly abusive form of employment?

Both these points raise another more general issue about the way models of child service work: in what way are situations which don't conform to the terms of the dominant model understood? For instance, to return to one of the questions posed above, can children in informal placements be seen as anything other than child servants? What will the effects be if they cannot? It is this type of question that I consider in the following pages.

### **Research in Two Courts.**

The juvenile courts in Sri Lanka continue to work within the frame of reference established by the Children and Young Persons Ordinance (1939) which was discussed in Chapter 3. The basic structure of the system also remains the same. Two types of juvenile courts, specialist courts and (what I will call) mainstream courts, operate under the Children and Young Person Ordinance (CYPO). Specialist courts

deal exclusively with children's cases and sit at separate locations from the adult magistrate's courts. One such court was established in the Colombo area during the 1930s, and continues to be the only court of this type in the country. Alternatively, juvenile cases can be heard by magistrates who also exercise adult jurisdiction, so long as they hold court hearings in a different building or room from that in which the adult court sits. This form of juvenile court is available in every judicial district in Sri Lanka, since every district contains an adult magistrate's court. In my research I looked at the way the juvenile system worked in both types of courts: the Specialist Court in the Colombo area, and a Mainstream Juvenile Court in the Central Province of Sri Lanka.

The bulk of the substantive research period (four months) was spent in observing and following up cases associated with the Specialist Court, which had in practice a much higher level of child related cases than the Mainstream Court. Thus during the 21 day observation period in the Specialist Court 217 cases were called, including those of 47 children (and adults) who were treated as being employed in some way. In contrast in the Mainstream Court, during the 10 day research period no cases were apparently dealt with under the juvenile jurisdiction, although during the same period literally hundreds of cases were called in the associated adult magistrate's court (see Appendix 2). Indeed according to a list supplied to me by the local probation department, during a five month period (19 January to 17 June 1996) there were only 42 child related cases in total dealt with by the Mainstream juvenile court. As a result the amount of data obtained from the Mainstream Court was significantly less than that obtained

from the Specialist Court. To this extent the Mainstream Court data cannot be viewed as a “scientific” control for the Specialist Court analysis (see Appendix 2 for a fuller discussion of the research process). It is nonetheless important because it forms an interesting counterpoint to the information obtained from the Specialist Court, as will be apparent in the next chapter.

### **The Juvenile Court System.**

The juvenile courts (both specialist and mainstream) operate a joint criminal and civil jurisdiction under the CYPO. They are empowered to try children and young persons (defined as under 14 and under 16 respectively) for all but the most serious offences. A juvenile court magistrate also has powers to deal with children deemed to be “in need of care or protection” under section 34 of the CYPO. Since what constitutes a child in need of care or protection is repeatedly referred to throughout the rest of this chapter, it would probably be useful to reiterate the definition supplied by section 34, which is as follows:

a child in need of care or protection is an individual under 16 who is either:

- a) the victim of a physical or sexual assault, or is a member of the same household as a victim or perpetrator of a physical or sexual assault; or
- b) “has no parent or guardian, or a parent or guardian unfit to exercise care and guardianship or not exercising proper care or guardianship” and is as a result “falling

into bad associations or exposed to moral danger or beyond control”.

Section 34 defines “moral danger” as including situations where children under 16 are found destitute, or begging, or wandering without “settled place of abode and without visible means of subsistence.” This wording suggests that children found outside the home and on the street may be the targets of the court’s concern, along with the child victims of physical and sexual abuse. On the other hand “bad associations” and “beyond control” are not clearly defined, so that the type of child behaviour and parental unfitness which falls within these categories is open to interpretation. For example, it was already noted in Chapter 3 that the beyond control ground was originally seen in the United Kingdom as a mechanism for frustrated parents to bring their delinquent offspring to court, but that in practice proceedings were often brought by social workers who applied their own understanding of the ground to instigate proceedings. In the same way it is open to Sri Lankan welfare officials and courts to define precisely which categories of children become the objects of scrutiny. Such categories could include child domestic servants, if the international and Colombo models of child work are followed. If child servants are victims of abuse, they could be presumably be seen as being in moral danger or falling into bad associations, and to have parents who are unfit because they placed them in that situation. Welfare officials, then, have an important role in the construction of child servants in the juvenile system, including officials from the police force and probation department, who support the courts in the exercise of juvenile jurisdiction.

The question of whether child domestic servants do come within the definition of children in need has been considered recently in the Court of Appeal. The Perimbarajah case (full citation Perimbarajah v Officer in Charge Minor Complaints Section, Wattala Police Station 1994 2 SLR Part 13 p 361) involved a boy of 13, Sethasivam, who had been placed as a domestic servant with the Jayaweera family, and who prior to that placement had not attended school for several years. On the recommendation of a probation report, the Wattala magistrate ordered that the boy should be detained in a certified school for three years. The Court of Appeal was critical of the way that Sethasivam's case was handled. It held that the magistrate had a duty to find out whether the parent was a fit person, and this he had failed to do. His order, the court said, had been unduly harsh, Sethasivam had committed no offence, and in any event there was no evidence that he was in moral danger or falling into bad associations. Finally, the court was concerned that Sethasivam had not been attending school, and that no action had been taken against his parents by the education authorities.

This judgement confirms that the standard of parenting is a deciding factor in the disposal of cases under section 34; but it also suggests that education and not the placement of a child as a servant is significant in determining whether a parent is fit or not. The judgement is quite specific, "State Counsel conceded that there is no prohibition in law to a young person being employed as a domestic servant. Section 34 reads as follows [the full wording of the section is cited]. The child Sethasivam does not fall within section 34 (1) (b) of the said section nor could one say that...as a

domestic with the Jayaweeras...he was falling into bad associations or exposed to moral danger or beyond control.” That is, on these facts, Sethasivam did not fall within section 34 (1) (a) either.

The Court of Appeal, in its judgement, stresses the importance of the parental duty to educate their children, as distinct from the duty of a guardian who has care of a child. “Employing a person under 14 years is not an offence if he is looked after and given proper care. The parent would be contravening section 43 of the Education Ordinance, and not the person who keeps the child as a domestic servant.” In making this statement the Court of Appeal was relying on provisions of the Education Ordinance, which only apply families of estate workers. Section 43 states that “where the parent of a child not less than 5 and not more than 14 years of age is resident on an estate, he shall cause the child to attend school.” This provision is a legacy of the restricted welfare system established on the estates during the colonial period, when estate owners were required to establish schools for the children of their workers (see Chapter 3). While there is an expectation derived from Roman Dutch law that parental rights include the right to control a child’s education (Goonesekere 1987: 211; see also Civil Procedure Code) there are, as previously mentioned, no compulsory education provisions which apply country wide. The effect of the Court of Appeal judgement on this issue is to highlight the importance of education without setting a precedent for the whole country, since there are no countrywide compulsory education regulations.

Although the Court of Appeal judgement does place emphasis on education, in accordance with international and Colombo models of childhood, it does not directly juxtapose education with work. Significantly, the judgement makes it clear, (and this part of the judgement does have country wide effect), that there is no objection to children under 14 working as servants, so long as they are well cared for, a position which reflects the provisions of the existing legislative structure rather than the influence of international and Colombo models of child service. Under the terms of this judgement child servants are *not* automatically children in need of care or protection. This means that welfare officials should not necessarily use their discretion to apply section 34 to children found working in other families.

The police have a responsibility to bring section 34 cases to court (section 35 CYPO), and they also initiate criminal proceedings in the juvenile court. National police policy on offences against children is centrally coordinated in Sri Lanka by a “National Police Desk for Child Abuse and Violence against Women” which is based at police headquarters in Colombo. In addition, every police division in the country has a specialised desk (or section) created in 1993 as part of the Government’s response to the problem of child abuse in Sri Lanka (Sri Lankan Government 1993) dealing with crimes committed against women and children. The functions of these desks are intended to be wide ranging involving both the prevention of child abuse and the protection of victims of abuse. Under their terms of reference, particular stress is placed on the role of the divisional desks in the enforcement of existing laws (for example on adoption and child labour) as well as on the establishment of police led



“community watch”, family support, and other prevention programmes. They are also responsible for returning divisional statistics on offences children to the national desk.

The Specialist Court area is also served by what I shall call the City A police desk, which was set up in 1979 as the only one of its kind in the country. Its responsibilities are very similar to the newer divisional police desks. In the view of one of its senior officers, OIC Loku Nuwara, the purpose of the unit is to deal with missing and “stranded” children, children who were the subjects of disputes and petitions, as well as street children. The unit covered the areas of 19 police stations in the Colombo district, and many stations referred children’s cases direct to the unit rather than dealing with them locally. In the main the City A police took the cases referred to them to the Specialist Court.

There is an important constraint on the power of these police desks to act in relation to working children. It is the Labour Commissioner and not the police who must institute prosecutions in the magistrate’s courts for breaches of employment law (section 29 Employment Act). A persistent lack of resources has meant that very few prosecutions have been brought. Instead it seems that the police in the Colombo area have developed the practice of bringing cases to the juvenile court under the CYPO. This practice becomes a crucial factor in the configuration of child workers by the court process, because children in the juvenile court are either criminals or children in need, rather than individuals with employment rights.

Probation officers also have a welfare role in their dealings with children. They have a responsibility to supply information to the court to assist in the decision making process and to supervise juveniles placed on probation orders (CYPO sections 17, 27 and 35). The service was put on a statutory footing in 1944, (Probation of Offenders Ordinance No 42), and its responsibilities were extended “to the care and treatment of all children and young persons who are in any way deprived of a normal home life”, following reorganisation into the Probation and Child Care Services Department in 1956 (Hamlin Report 1957 cited in Sessional Paper No VI 1988). Most recently the organisation of the department has been affected by the move to devolve powers to the provinces under 13th Amendment to the Constitution (1987). Under this amendment Provincial Councils were established in each of Sri Lanka’s provinces and were given administrative and legislative powers. Following devolution probation and child care services are now administered by Provincial Probation Commissioners with the central Probation Department having, (although there was some uncertainty), a monitoring and policy development role (Grime 1994: 34). In the Specialist Court area the probation department came under the Western Provincial Commissioner, and the officers in the Mainstream Court area studied were administered by a Commissioner based in Kandy. As a result, provinces have become more or less autonomous in their implementation of probation and child care services, creating the potential for different probation policies. Again, this is another crucial factor in the way that child domestic service is constructed by the juvenile court system.

In the remainder of this chapter, and in the next, I will look at how the juvenile court

system actually works in the two courts studied, bearing in mind the influence that police procedures and probation policy have upon the process. The question of how section 34 is interpreted in practice, and the constructions of children which emerge will be discussed in some detail. I start by looking at the operation of the Specialist Court in this chapter, before discussing the Mainstream Court in the next chapter.

### **The Specialist Court.**

The Specialist Juvenile Court sits on the second floor of a dilapidated office building on a main road in the suburbs of Colombo. Traffic noise is a continuing and intrusive feature of all proceedings. Indeed were it not for this noise privacy would be difficult to maintain during hearings, because the court room has no doors and is only separated from the office and waiting areas by wooden partitions. People waiting for their cases to be heard gather in the hall way next to the court, and at the court entrance, sometimes peering in to see what is going on.

The court room itself is dominated by a raised bench, at which the magistrate and the stenographer sit. Immediately in front of the bench there is a box, about eight to ten inches high where the children stand when facing the scrutiny of the court. To their left and right are the tables where the police and probation officers sit, and directly behind them is the table where the court *mudaliyar* (clerk) stands. Behind her and facing the magistrate's bench, is a table reserved for legal representatives. Parents and other involved adults are allowed to congregate in front of the lawyers table, and

when a lawyer addresses the court he or she comes forward and stands near the client.

Children waiting for their case to come up assemble either in the small and shabby public waiting area or are kept (as detained children) in a side room separated from the main waiting area by another wooden partition and a half door and are attended by adults in prison uniform. Once a case is called the child is brought into the court room, accompanied either by a relative or a prison officer. During the four week observation period 142 children made 217 such appearances. Of these I followed up on the cases of 47 children, and some of the basic details about them are given in Table 1 overleaf.

At this point I want to give a brief introduction to some of the children whose stories feature most prominently in the rest of this chapter. In so doing I want to counteract (however slightly) the tendency to place children in homogenous groups (as child servants for example), a tendency which is evident in base data tables as well as in court proceedings. What I hope to do is to suggest the different experiences of the children caught up in the cases observed, although I am constrained not to reveal too much detail, to avoid any possible identification of them or their families (for the same reason *all* names in these chapters have been changed).

Children and their Parents: Malathi.

Malathi was brought up in a children's home. Her mother had put her into the care of the Probation Department when she was very young, and there she remained, in the

**Table 1. Case data: Age and Legal Category of Children in Cases Researched.**

Child's Name	Age in 1996 (Approx)	Servant	Employed	Sweep/ Loiterer	Custody	Cruelty	Criminal
Alicia	Infant				x		
Amirtha	15		x				
Anthony	NK	x					
Anura	13			x			
Asita	9	x					
Bala	17	x					
Bel	17-20	x					
Cankili	12-13			x			
Chamilla	15	x					
Damaya	5			x			
Deepal	16						x
Dharma	14	x					
Dineka	4				x		
Eliza	Adult	x					
Gananath	15			x			
Ganesa	15	x					
Godfrey	12	x					
Grace	10				x		
Jacinta	15	x					
Jeyaraja	16	x					
Khadija	8 -9					x	
Krishnan	12	x					
Kunavira	15	x					
Lakshmi	7			x			

Child's Name	Age in 1996 (Approx)	Servant	Employed	Sweep/ Loiterer	Custody	Cruelty	Criminal
Leela	13	x					
Mahinda	9	x					
Malathi	16				x		
Nalani	14	x					
Nandani	16-17	x					
Neelan	16		x				
Nelunika	13	x					
Niranjana	5	x					
Nuradeem	12			x			
Puviraja	16						x
Ranjan	NK			x			
Safia	15-16	x					
Siriya-wathi	14	x					
Siva	10	x					
Skanda	4	x					
Soma	17	x					
Sonia	11			x			
Stanley	9					x	
Sumana	13	x					
Tilak	17	x					
Vikrama	11-12	x					
Vishnu	11	x					
Yusuf	14						x
Total (47)		28	2	8	4	2	3

The categories in this table refer to the grounds on which the children were brought to court under the CYPO. Children defined as child servants; or in various forms of employment; or found wandering the streets (loitering); or selling lottery (sweep) tickets; and children who were the victims of cruelty were brought under section 34. So, it seemed, were children who were the subject of custody applications. As already explained, criminal cases were also brought to the court.

words of the probation report “getting an education”. At 16 Malathi had gone to live with her mother, but this had not worked very well and she had returned unilaterally to the children’s home. Now, once again her future was being decided by the authorities.

Children on the Street: Damaya and Ranjan.

Damaya, who was nearly 6, and his sister who was a year older, were brought into court on a Monday morning by the City A police. They had been picked up by the police the previous Friday, after they had allegedly been found begging with their grandmother, who was severely crippled with polio. Their mother, baby brother, two aunts, cousin and grandmother were all in court when they arrived, but the children were kept rigorously apart from their family by the police, although this would have been the first chance the children had of seeing their mother since coming into custody. The family said that they were worried about the children, one of them had had yellow fever in the past, and the mother had been unable to visit them because she needed permission. The proceedings on that Monday morning focussed on whether the children should be allowed to return to live with their mother.

Ranjan’s family lived in a small shanty squeezed between the external, sea facing wall of a railway station, and the sea itself. The strip of land that the house and other similar homes occupied cannot have been more than 20 feet wide. Ranjan was about 14 and had been picked up by the police when going to buy his sister a cup of tea. He

was visibly upset during his court appearances and his sister said (and the probation officer agreed) that he wanted to go home.

Children in Other Families: Nandani, Jacinta, Soma, Mahinda, Leela and Nelunika.

Nandani was an attractive girl, whose age was variously given as 16 (by the police) or around 15 (doctor's report). Her home was in the foothills of the central highlands of Sri Lanka, and she lived with her father, brother, sister and several aunts and uncles. It seemed that this arrangement had created problems for Nandani. One of her aunts by marriage accused her of being "friendly" with her husband, Nandani's uncle. She made this accusation to Nandani's school friends, who spread the gossip around, so that Nandani decided that she could no longer go to school. Another aunt then found Nandani a place with Mr and Mrs Bandara, where it was hoped she would get some training in cookery.

It is more difficult to introduce Jacinta, because unusually she was not brought to court, despite being in custody. Aged 15, she had been picked up by the police while working as a servant in the middle class home of Charles Seneviratne in Colombo. Jacinta's father, Mr Ponnambalam, was in court however. He travelled from the family home on a rubber estate, to be in court. Once there the magistrate, as he said, "reprimanded me", reducing him to tears in the court room. He was, though, granted custody of Jacinta, who was then sent off to relatives for the Deepavali holiday.



Soma came from north of Colombo. His father, Mr Perera, was a watchman on a large coconut estate, and the family lived in a small bungalow in the grounds of the estate. Through his father Soma had come to work in a house in Colombo. He was adamant that he had not enjoyed the experience. Of all the children he gave the most detailed account of what he had had to do, and from his account he had been overworked, under fed and occasionally beaten. Unsurprisingly he expressed no wish to go back to work.

Mahinda, aged 9, was also a child described as a domestic servant in the court proceedings. He had runaway from the family he had been living with, after being hit on the leg by a stick. He had been picked up by a passer by and brought to City A police, who then started proceedings. Mahinda seemed rather confused and upset by the proceedings, telling the magistrate on one occasion that he wanted to return to Mr and Mrs de Almeida, the people from whom he had runaway, and on another occasion saying that he wanted to be with his mother, Gameela.

Leela was another child brought to court as a domestic servant. She was a quiet girl of around 13 who came to the court twice during the research period. A lasting impression is of Leela sitting at the probation table, after the end the court session, flanked by her mother and father (who were separated) and Roshani Hussein who had taken her in, and being asked by the probation officer whether she wanted to live with her mother or father. After a long pause Leela said that she wanted to be with Roshani. It was this issue, the question of where she should live, which was central

to her case.

Finally, Nelunika. During interview she came across as a timid and isolated child (aged about 12 at the time of the interview), who said that she had no family of any kind. She remembered living with a lady called Estelle. She said that she had worked there, that she had “washed clothes, swept the house.” Nelunika had not gone to school full time, unlike the other two children who had lived there, and she said that she hadn’t liked living with Estelle because she had to work. In contrast (in the context of an interview at the home) she said that she liked being at the children’s home. Nelunika also said, however, that she liked Estelle, and that she would like to see her. Estelle, for her part, hoped that Nelunika would come back to her.

#### Court Personnel.

The Specialist Court is run by a relatively small number of people. There is only one juvenile magistrate, in 1996 it was Mrs Usavia, who is appointed for a three year term and who sits on a regular basis. Other senior members on the court staff are the court *mudaliyar*, Mrs Kallu, who acts as an intermediary between the magistrate and the litigants, the court stenographer, and the court registrar (or administrator) Mr Suddu.

Mrs Usavia occasionally sits in other courts and during her absences she is substituted for by Mrs Attai, a qualified lawyer, who acts as an additional magistrate with very limited powers. Mrs Attai has based her practice in the Specialist Court and as a result

she is instructed in the vast majority of cases where there is legal representation. This can mean that she sometimes sits as additional magistrate in cases in which she also represents one of the parties.

Officers from several police stations in the Colombo area took proceedings in the Specialist Court. Many cases were brought by the City A police, and by the police desk based in Suburb 1, which had been created as part of the 1993 policy initiative. Mrs Gama, one of the senior officers at the Suburb 1 police desk, confirmed that she brought all children's cases to the Specialist Court.

The duties of probation officers include monitoring children's homes, supervising children on probation as well as investigating the background of children brought to court. There were five officers attached to the Specialist Court three men, Mr Dekai, Mr Hatarai and Mr Ekai, and two women, Mrs Tunai and Mrs Pahai. Although salaries are low and the responsibilities wide ranging, the probation officers seemed to find the job rewarding. Mr Dekai commented that he found the job satisfying, and Mr Hatarai was sufficiently committed to be doing research for a post graduate degree. The five officers cover specific districts in the Colombo area. They are also expected to make weekly attendances at court, on the day allocated to them. As a result there is usually a probation officer in court whenever it sits.

I began this section with a description of the court, and the way the participants are arranged in it. Seen from a perspective influenced by Donzelot this arrangement is

indicative of the influences which operate to construct children in the court room. The magistrate presides, but it is the child on the box who is the focal point of the proceedings. On either side of the child are the police and probation officers, who represent the complementary disciplines of correction and welfare which are exercised upon the child. The police initiate the proceedings, but it is the probation officer who is the key actor. He or she provides a report (sometimes as little as one page long) in which the child is interpreted, and on the basis of which the court is expected to make a decision (section 17 CYPO).

Intervention from legal officers is reduced to the background, as is the participation of the parents. Nonetheless it is the magistrate, the senior representative of the judicial system, who makes the final judgement about the children in front of her. Both a probation and a police officer suggested that the magistrate normally followed the recommendations of the probation department in her decisions. This suggestion seemed to be accurate in the 10 cases observed, in which probation reports were made available. This indicates that the magistrate was influenced by welfare officials in reaching her decisions, suggesting as Donzelot would predict, a decentring of law in the face of welfarist discourses represented by probation. However another probation officer mentioned a case in which the magistrate had declared his recommendation unlawful (Mr Ekai Interview 3.9.96); and on at least three occasions during the research the magistrate made a disposal before a probation report was received. Taken together these examples suggest that the magistrate did act to exercise a legal judgement in the decision making process, although constrained by a system that is

structured by the discourses of childhood.

Participants in this system express various ideas about children, their activities and their families. What I want to do in the next sections is to identify these ideas and discuss them in terms of the legislative and Colombo models of child work described above.

### **Children and Education.**

The question most regularly asked by the magistrate, Mrs Usavia, in her brief exchanges with the children in front of her was about education. “Did you go to school?” she asked Nuradeem, who had been picked up by the police at the Galle Face, a haunt of “loiterers”, snack food vendors and young lovers. Nalani, a child domestic servant, was asked “Do you like to be educated, go to school, learn a craft?” Similar questions were put to Leela and several others. Parents were also frequently challenged by Mrs Usavia about their children's education. “Why”, for instance, she demanded of Ganesa's mother, “Why wasn't the child allowed to sit for exams before being pulled out of school?”. Ganesa, it should be noted, was 15 and relatively well employed in an aluminium factory in Colombo. Equally she criticised the mother of another child found at the Galle Face, “how was he found [there]. Why not go to school?” Most often she simply directed parents to “send the child to school”.

The need for education is a central tenet of the child development discourses which

influenced the drafting of the CYPO, and continue to influence international discourse on children. Education is treated as a prerequisite for normal social development. Education is also considered crucial in leading a child away from delinquency. That is the principle behind the certified schools established under the ordinance, and which underlies the duty placed on all courts “in a proper case” to “take steps for removing [a child] from undesirable surroundings, and for securing that proper provision is made for his education and training.” (section 21 CYPO).

As I mentioned above, the importance of education and the parental duty to educate was also stressed by the Court of Appeal in the Perimbarajah case. The court referred to section 43 of the Education Ordinance which obliges estate families to send their children to school, and commented that Sethasivam “had not attended school but [he] has been playing cricket which has now become a national pastime and quarrelling with the neighbours’ children, but no action had been taken by the Education Department or its officers...”.

The Perimbarajah case was not cited in the Specialist Court during the research period, and Mrs Usavia’s concern with the parental duty of education both reproduces and exceeds the approach of the Court of Appeal. This is illustrated by her approach in Damaya’s case which focussed on the question of education. The probation officer, Mr Ekai, told the family before the first court hearing began that they would need to produce documents showing that the children were going to school. The magistrate was equally clear. She commented that school would start on 7 October and that “To

get custody of the children get a document as proof from the school. Bring a letter from the principal stating when the children started school...”. Although the case was due to be heard on 7 October, Damaya’s mother arrived at court on 30 September with the necessary letter (and school uniforms and books), hired Mrs Attai’s services and got the children released to her on a bond.

Talking to Damaya’s mother, Mabel, after the case, it seemed that she had been put under pressure by the proceedings. She said that the court and probation had said that the children should be put into a home, and that she had not wanted this. The magistrate had also told her that she should stay at home to look after the children. As a result the family income had been reduced to 100 rupees a day (just over one pound sterling), which is what the grandmother earned from selling sweep tickets in the city centre. Mabel had been forced to pay two days income (to Mrs Attai) in order to get her children back.

The only basis on which Mrs Usavia could hold that custody of Damaya was contingent upon his mother sending him to school, would be if she was treating education as a test of adequate parenting under section 34. The Court of Appeal would have agreed that education is important, but it did not suggest that Sethasivam should be placed in a home because his father had failed to educate him. It is arguable therefore that Mrs Usavia had no grounds under section 34 for interfering with Mabel’s parental rights, nor those of the other parents whom she criticised. In addition, Mrs Usavia was effectively enforcing non existent compulsory education

provisions on children that came before the court. There is no requirement that Damaya and the others attend school.

The five probation officers also all stressed the importance of education at one time or another. Mr Dekai, for instance, asked Cankili, a boy of 13 who had been found selling sweep tickets, whether he would like to go to a children's home so that he could be educated. He had, apparently, never been to school. Cankili did not respond very positively to this suggestion. Despite his suggestion, Mr Dekai recommended that Cankili be returned to the care of his father, although he described family relations as bad. In making this recommendation, Mr Dekai seemed (unlike Mrs Usavia) to take the position that while education was important, it should not necessarily be pursued at the price of parental custody. Perhaps what made a difference in this case was the fact that Cankili's father had apparently agreed to exercise greater parental responsibility, by paying "special attention to food, clothing and guardianship." Cankili was allowed to return home on the basis of this recommendation.

### **Child Parent Relationships.**

Failure to educate children was not the only basis on which parents might lose the custody of their children in the Specialist Court. Consistent with the focus on parenting standards in the CYPO (see discussion Chapter 3), and the CRC and Children's Charter (see Chapters 2 and 4), concern was also expressed that some



parents were not controlling or supporting their children appropriately. In addition two cases (those of Khadija and Stanley) involved child cruelty, perpetrated by family members. These concerns led, in a few cases (and not those of Khadija or Stanley), to recommendations that children be put in a children's home.

This was the situation in Mahinda's case, after he had been placed by his mother, Gameela, with the Almeida family, apparently after meeting Mrs Almeida on a bus. Mrs Tunai, Mahinda's probation officer, was very critical of his mother, perhaps not surprisingly if this circumstance was true. She described Gameela as not having a "proper family life" and noted that Mahinda's father was not married to Gameela, and that he was her third partner. Gameela had, she said, "been living on the pavement" and at "one point [she was] living in [a] Detention Home with two children. Often she is drunk." These criticisms were echoed by OIC Podi Nuwara (City A police), whose officers had picked up Mahinda. She said that Gameela "drinks a lot of arrack" and that Mahinda would not have a "steady life" if he returned to his mother, as both he and she wanted. Mahinda's aunt expressed similar views to me. She said that she had tried to care for Mahinda in the past, but that Gameela, who was her sister in law, kept on coming and disrupting Mahinda. Gameela was, she said, a "bad character" who moved from man to man. She also claimed that her house was the only settled place that Mahinda had known.

These accounts suggest that Gameela was incapable of offering Mahinda what was considered to be appropriate parenting. She would not be able to control his

behaviour, since she drank, and she could not keep him off the street and in a home environment. So, because there were, in Mrs Tunai’s view, no suitable relatives willing to care for Mahinda, there was no alternative but to put him in a home.

At the same time that the child parent relationship was put under scrutiny, the Specialist Court process also seems to have placed considerable importance on reinforcing the parent child bond, and this is illustrated by case outcomes, and by the magistrate’s statements in a variety of cases.

Table 2 sets out, as far as possible, the outcome in 40 cases involving children defined as domestic servants, or as employed, or loitering on the street, or as the victims of cruelty.

**Table 2. Outcomes.**

	To Parents/ Relatives	To Institution	To Receiving Family	Other	Case Continuing
Domestic Servants	13	4	2	2	7
Employed	1	-	-	-	1
Loitering or Sweep Ticket Sellers	4	1	-	-	3
Child Cruelty	2	-	-	-	-
Total: 40	20	5	2	2	11

(The category of “other” refers to the outcome of 2 cases: Tilak’s and Sumana’s. Tilak was sent for vocational training, and Sumana’s case was dismissed. She had applied to the court for assistance in obtaining the salary owed to her for her work as a servant.)

20 children were sent back to live with their parents (or relatives) and only 5 were put in children’s homes. Significantly, 13 children described as domestic servants, were allowed to return home, despite the fact that, like Mahinda, they had been living in an informal placement. None of these parents were deemed to have failed as completely as Gameela, and they were allowed to resume the care of their children. In fact the attitude taken in Gameela’s case was unusual. The only other children described as domestic servants who were sent to an institution, Nalani, Nelunika and Safia, were sent there because their parents had lost contact with them, or were dead, and not because they were considered to be unfit. The large number of children sent home by the court (that is by the magistrate having been advised by the probation officer) suggests that the parent child relationship was usually given priority in the Specialist Court. In contrast only 2 “children” were returned to the place they had been living before proceedings began, and both were unusual cases. Bala was 17 and was not a domestic servant despite the description in the police report. He had been working in a bakery and was allowed to go back to work. Eliza was a servant, but she was not a child. Since she was 23 she was sent back to her employer and the proceedings involving her were not pursued.

Mrs Usavia also demonstrated the court’s concern with the parent child relationship

in her dealings with children who had run away from home. Mrs Usavia dealt with two such children on the same day that Damaya's case was heard. Both R and D had travelled unaccompanied to Colombo on the train. Both said that they had just wanted to go on the train. Mrs Usavia asked R why he had come to Colombo without telling his mother and it emerged that the boy's father had beaten him, "Because I do not do my studies", to which the magistrate responded "So, why cannot your father reprimand you?".

In the case of D the magistrate asked him about his education and went on "Do you worship your parents before you go to school?... Go ask forgiveness from your mother and never do this again." "Worship" in this context involves kneeling before a parent, with your forehead on the floor, and outstretched hands touching their feet; a gesture which is reminiscent of the act of respect performed by worshippers before, for example, a Buddhist monk. Respect for elders is an important aspect of Buddhist morality, and D was required to make a public demonstration of his respect for his parents, and his contrition, in front of the court, by performing this act.

Mrs Usavia's attitude towards R and D suggests a preparedness to affirm (in a morally significant way) the parent child bond in cases of good parenting, for example when children were being sent to school. Equally though she expressed strong views on the parent child relationship in Malathi's case, even though her mother had not brought her up.

Malathi had, as already mentioned, been living for a short time with her mother, after spending her childhood in a children's home. The relationship with her mother broke down, and Malathi made her way back to the home. There seemed to be no question that she would return to her mother and there was no legal reason why the situation should be referred to the magistrate. The probation report though recommended that the court should "advise the mother", and Mrs Usavia took the opportunity to "advise" both Malathi and her mother.

She began by questioning Malathi's mother: "What are you doing now?"

"How much of money do you have?"

"Are you the girl's mother?"

"Do you go to see your daughter?"

"Do you do a job?"

"Is your husband living with you?" "No."

"Do you have your daughter's money with you?"

"Can you support your daughter?" "No."

"So," Mrs Usavia commented, "if a mother does not support your own child who will look after [her]?"

Turning to Malathi she said: "Why do you not like to go to your mother?" Malathi explained that people were saying bad things about her mother. Mrs Usavia responded:

“Why do you listen to what outside people have to say about a mother? You did not see your mother living with another man? Why do you reject your mother? A girl needs a mother very badly. You were given to a home for looking after. Your mother does not have any financial support. Your father does not give any money. Do not listen to other people. Do not accuse your mother listening to outside people. She is your mother. She kept you in her womb for 10 months. So if your mother did a mistake, talk to her and take her on the correct path. I do not agree with you vilifying your mother.”

Mrs Usavia then told Malathi’s mother to visit her in the children’s home, “keep the relationship going.” Returning to Malathi she told her to beg her forgiveness by performing an act of worship. Malathi had to go on her knees in front of her mother.

This small drama represents a strong endorsement of the parent child bond. Malathi was required to make public recognition of the duty owed to her mother, despite the fact that her mother had never cared for her herself, and there did not seem to be much of a relationship between them. What was important was the idea of the relationship, rather than the realities of Malathi’s situation.

### **Children and the Street.**

The CYPO is predicated on an idea that good parenting is required to prevent children slipping into risky or at risk categories. This idea is associated with the notion of the

importance of environment for children, where environment is seen as the most significant factor in shaping child behaviour, including criminal behaviour (see Chapter 3). In this connection the ordinance identifies the street as a particularly inappropriate environment, by specifying that children found destitute, or begging, or wandering without “settled place of abode and without visible means of subsistence” are *ipso facto* in moral danger.

In my small research sample 13 children, of the 47 whose cases were followed, found themselves in court having been picked up for being on the street (see Table 3 overleaf). Geoffrey’s experience, although his was not one of the cases followed, suggests the extent to which children were vulnerable to police detention. He was brought to court having run away from home because he felt that his mother did not want him. His father was dead and his mother was in a new relationship. Geoffrey said that he had been living in Colombo for a month, selling *tembele* (coconuts) and that this was the third time that he had been picked up by the police. The comment made in court was that he would be put in a home, if his mother did not come forward. What was certain was that he would not be released back on to the street.

Gananath, who was aged about 15, was arrested by the police for selling sweep (lottery) tickets. He was fortunate in that he had contacts with a street children organisation who arranged a lawyer for him. Gananath’s lawyer, unusually, challenged the validity of the proceedings. He argued, correctly, that Gananath should not have been arrested for street trading. It is not illegal for a boy of 15 to work on the

**Table 3. Events Which Triggered Court Proceedings.**

Child's Name	Petition	Police Pickup	Complaint	Other	Not Known
Alicia				x	
Amirtha			x		
Anthony	x				
Anura		x			
Asita			x		
Bala		x			
Bel				x	
Cankili		x			
Chamilla					x
Damaya		x			
Deepal		x			
Dharma			x		
Dineka			x		
Eliza			x		
Gananath		x			
Ganesa			x		
Godfrey		x			
Grace			x		
Jacinta		x			
Jeyaraja			x		
Khadija					x
Krishnan					x
Kunavira		x			
Lakshmi		x			



Child's Name	Petition	Police Pickup	Complaint	Other	Not Known
Leela			x		
Mahinda			x		
Malathi				x	
Nalani			x		
Nandani	x				
Neelan		x			
Nelunika	x				
Niranjana	x				
Nuradeem		x			
Puviraja				x	
Ranjan		x			
Safia			x		
Siriyawathi					x
Siva		x			
Skanda	x				
Soma	x				
Sonia		x			
Stanley			x		
Sumana			x		
Tilak			x		
Vikrama		x			
Vishnu					x
Yusuf		x			
Total (47)	6	17	15	4	5

(The category “police pickup” refers to cases in which the police took the initiative and detained children, as distinct from petition and complaint cases where the police responded to reports from the community. The cases of Alicia, Bel, Malathi and Puviraja come the category of “other”. Alicia’s case was begun when her mother approached the court to have her adopted; Bel’s and Malathi’s began by way of motion; Puviraja was brought as part of criminal proceedings.)

streets, and even if it were, according to employment law it is the employer and not the child who should be arrested. Similarly, in carrying on a trade, Gananath could not be understood as “destitute”, “begging” or “wandering without place of abode or means of support” which might have placed him in the category of being “exposed to moral danger” under section 34 (CYPO). The magistrate’s response to this argument was simple: he was “on the street, no?”. Her reply, and Gananath’s continued detention, suggests that it is wrong *per se* for a child to be on the street, for whatever reason, simply because it is the wrong sort of place for a child to be.

The reason why the street poses such a particular danger to children was alluded to by both police and probation officers; on the streets children are without adult control, and are open to unsuitable influences. Mr Dekai expressed concern about a child, Anura, who was found begging or loitering on the street. He noted that Anura had not attended school for some time, and that he had “got used to roaming with [his] peers. Does not listen to [his] mother, shows stubbornness.” Other children picked up by the police were further out of control. Deepal and Puviraja were both found roaming around. Deepal, according to the police report “loiters often in Fort [a district of Colombo] near the railway station bus halts, and has got together with a gang of adult thieves. He is also addicted to heroin. It is observed that he could become a criminal and be a menace to society.” Puviraja already had a criminal record of increasing seriousness. At 16, he had been convicted of stealing tea leaves (sic), stealing a watch, and being in possession of heroin. He now faced a charge of burglary. In the probation report Mr Ekai commented that his “grandmother [had] not brought him up, only

made him live...since [he had] no education he does not know good or bad. Just goes around with friends...". Mr Ekai recommended that Puviraja should go to a young offenders training school. It was presumably the possibility of this sort of drift towards criminality which led Mrs Tunai to suggest that Ranjan should be put in a children's home.

Both Ranjan's prospective fate and Gananath's continuing detention reflect the willingness of the Specialist Court to enforce the existing legislative framework, and its definition of the street as an inappropriate and uncontrolled location for children. What these cases also suggest is that the definition of moral danger has become broadened in its application by the court. As argued above, Gananath's circumstances do not come within the definition of moral danger supplied by section 34 (CYPO) since he was on the street for trading purposes. Ranjan's situation was even more anomalous. According to his sister he had been sent to buy a cup of tea. The fact that he had been picked up while running this errand, and faced the prospect of being put in a certified school, suggests that the Specialist Court was prepared to impose stringent controls on the access of children to the streets for any reason, perhaps particularly, like Ranjan, the children of shanty dwellers.

### **Children and Work.**

If children are not supposed to be on the street, then neither are they supposed to work. This position was made clear by the court in the treatment received by Ganesa

and Amirthalingham. The boys, both aged 15, worked in the same aluminium factory and were relatively well paid. Ganesa loaded lorries and Amirtha wrapped goods and did some cleaning. Suburb 1 police took proceedings and produced them to court on the basis that they were “underaged” and employed. In Ganesa’s case he was described as employed in service.

The police action seemed to be contrary to the existing legislative framework. At 15 Ganesa and Amirtha came into the category of “young person” according to the provisions of the Employment Act (section 34). The Factories Ordinance 1942 also applies to the operation of an aluminium factory (section 126), and also defines a young person as someone over 14. Neither statute contains any prohibition on a young person working in these circumstances, so long as he or she is given proper breaks and holidays, and is not required to work at night (Employment Act section 8; Employment of Young Persons Regulations 1957; Factories Ordinance Part VII). Further, if either of these Ordinances had been breached proceedings should have been taken in a magistrate’s court (Employment Act sections 9 and 14; Factories Ordinance section 118).

Mrs Usavia did not address these legal issues (nor were they raised in court although a lawyer acted for the employer in Ganesa’s case), but accepted jurisdiction in both cases, indeed in all cases of child work that came before her. She allowed the boys to go home, but she criticised Ganesa’s mother for pulling him out of school, and told her that he should not work until he was 18.

Three of the probation officers were unclear about the minimum age at which children could work. When directly asked they identified different ages (Mrs Pahai and Mrs Tunai were not asked). Mr Dekai said 15, Mr Ekai said that it had recently changed to 18, and Mr Hatarai said 14, and went on to say that “under 18 a person is a child, under 14 the crime is even worse”. This lack of clarity may reflect the confused state of the law mentioned in Chapter 3, (the minimum age is 12 but there are restrictions for various occupations, Employment of Children Regulations 1957), and an awareness of the ongoing policy debate. Both Mr Ekai and Mr Hatarai mentioned media announcements on child employment, and Mr Ekai’s assertion that the minimum age was now 18 probably refers to a recent amendment to the Age of Majority Ordinance, reducing majority from 21 to 18. In any case, as with Mrs Usavia, there seemed to be a preference for children working later rather than sooner.

OIC Podi Nuwara also took a strong line on children working. She considered it to be inappropriate, in connection with a street children project, for children to be encouraged to work in order to buy school books. OIC Gama agreed, child labour was an abuse of child rights she said. Children should only work after 18, or if they work out of necessity the rules may be relaxed to allow employment at 16.

Mrs Usavia herself was prepared to be more flexible where a child was working at 17. Bala, who was 17, had been employed in a bakery in Colombo for over two months when he was detained by the police. He told them that he had been well treated and paid, but nonetheless the police report described him as “a domestic servant” and

noted that he had not been sent to school, nor had any money been deposited in his name. Bala spent a night in the Pannipitiya Home but was released by the court the next day, although he was required to report to the police station once a month. No reason was given for this requirement.

Bala's case is an example of the tendency of police reports to describe working children as domestic servants, whatever their precise occupation. Children working in hotels, factories and bakeries (Ganesa, Krishnan, Kunavira, Siva and Vishnu) were all described as servants. Significantly they could not be not recognised as working children, because the police circumvented the labour authorities, and brought proceedings under section 34 (CYPO). Defined as domestic servants, they were brought within the ambit of the juvenile court, and were produced on the basis that they need care or protection. This (as mentioned above) marks a crucial step in the configuration of child servants.

Another crucial step is the tendency of the police, probation officers and Mrs Usavia herself to subsume *all* forms of informal placement into the same category of child service. This categorisation meant that a whole variety of informal relationships were rigidly defined as child domestic service. In some cases this definition was accurate, in that the children were solely in the household to do domestic work. However, even within this group of children there was a range of conditions and experience.

Chamilla's situation conformed to the dominant stereotype of the life of a child

domestic servant. Her father was dead, her mother was working abroad, and her grandmother had given her, for 350 rupees a month (less than four pounds sterling), to a middle class family in which the husband was a police man and the wife a pharmacist. Chamilla had demonstrably been badly treated, she had scars on her back, and she told City A police that she had been beaten and scolded by the woman.

Mrs Usavia's expectations of the treatment of child servants received was clearly expressed during Chamilla's case. She made two particularly telling comments: "The general position is to employ a child, get work done and then beat him or her up", and later during the same hearing she said "It is a crime to employ children, and still more of a sin to beat them up." To compensate Chamilla for her experiences she demanded a minimum 10,000 rupees (approximately one hundred pounds sterling) compensation.

Mr Dekai was similarly concerned about child servants. He said that in 95% of cases child servant were badly treated. Another senior probation officer argued that even if a child in such an informal placement was well cared for "he would be different from the other children". All the probation officers agreed that such placements were inappropriate.

But not all children employed as servants were badly treated. Jacinta's situation was not the same as Chamilla's. To begin with there was no suggestion that she had been mistreated in any way. She had been paid a (low) wage of 750 rupees a month (around

eight pounds sterling), and she explained to the police that “because [it is] difficult to exist without income she had come to Colombo to be employed in a house”. Legally, aged 15, there was no reason why she (Jacinta) should not. Nonetheless this placement was understood by both Suburb 1 police who brought the case, and by Mrs Usavia, as illegal and treated accordingly. Jacinta was detained by the police, produced to court as a child in need, and subsequently returned home to her family. In effect the application of section 34 (CYPO) was extended to children who were simply employed in houses in circumstances where no crime had been committed.

The majority of children in my small sample did house work, but not all the children defined as servants seem to have been placed with receiving families on this basis. Niranjan and Nelunika were both much younger than Jacinta when they went to live with Adele and Estelle respectively. Adele said that she had taken Niranjan in “out of sympathy”. According to her Niranjan’s father was a drug addict and his mother had left the family. He was only 5 and he had lived with her for 18 months. Nelunika was placed with Estelle when she was 3. She was taken in as a “companion”, Estelle said. She had to do some housework and was not sent to a mainstream school because she did not have a birth certificate. There was no suggestion that either of them were ill treated in terms of sexual or physical abuse, or that they were falling into bad associations or moral danger which might mean that section 34 (CYPO) would apply to them. There was also no suggestion that either of the children were being employed contrary to the regulations which prohibit child employment under 12.



Neither child was formally educated when they were with their receiving families, although Nelunika was sent to Sunday school. The reason given by most receiving families for this failure was that they did not have the child's birth certificate, and that therefore no school would admit him or her. Although there is no legal requirement that a birth certificate be produced, there did seem to be an administrative practice among schools in both the Specialist and Mainstream Court areas that children had to have one. The lack of education in informal placements was a critical point for most police and probation officers. When discussing informal placements, Mr Dekai said that "employers" said that they would educate children but they did not. They were talking not doing.

This preoccupation with education in informal placements was taken to some length by Mr Ekai and OIC Gama in relation to Nandani. They both expressed concern that, although receiving what they both considered to be good treatment otherwise, Nandani was not sent to school. Mr Ekai went as far as to say that the fact that Nandani had not gone to school meant that the Bandara family had not treated her as their foster child. This was despite the fact that Nandani had left home precisely because she no longer wanted to go to school, where she was the target of gossip, and at 15 or 16 she was above any notional school leaving age. Like Jacinta and several other children, the placement with the receiving family had not prevented Nandani from going to school, because she had already dropped out. OIC Gama though said that she thought that children should go to school until they were 18, and along with Mr Ekai argued that Nandani should take her GCE exams so that she could get a job

in an office or garment factory.

Still, neither the placement of Nandani, nor those of Niranjan and Nelunika, were actually illegal. Informal placements continue to exist in a legal grey area, only potentially illegal pending the implementation of the custodianship provisions under the 1941 Adoption Ordinance. In the absence of administrative machinery to regulate such placements, it is hard to argue that failure to comply with the legislation renders any placement illegal. However, by defining children such as Niranjan and Nelunika as child servants, the Specialist Court system brought them within the ambit of its jurisdiction. An understanding that child servants are usually abused allows them to be defined as children in need of care or protection, and treated accordingly.

This approach also allows people such as Adele and Estelle to be treated as “employers”. As employers they were required by Mrs Usavia to pay the children compensation. Mrs Usavia was aware that this practice was legally questionable, and she said that what she did was “persuade” the employers to pay some money. Under state law (Code of Criminal Procedure section 266) it is possible to “compound” a case where certain offences (not including child cruelty) have been committed. The effect is to acquit the offender in return for a monetary award to the victim. Since the Code of Criminal Procedure applies in default to the juvenile court, Mrs Usavia might be able to argue that she is simply facilitating the compounding of cases. But the point is, as with many of the child “employment” cases that come before her, that an offence has not been committed as the Perimbarajah case made clear.

In general the redefinition of children in informal placements as child servants marks a reluctance to recognise informal arrangements in the court system. Mr Ekai told me that some time in the past he had recommended that a child stay in an informal placement, because he had seemed to be well treated. He said that the carers had behaved like foster parents to the little boy, and he noted that he had been privately educated to get round the lack of a birth certificate. Mrs Usavia, though, had taken a different view. She had said that Mr Ekai's recommendation was illegal, and she had ordered that the little boy be put in a children's home. Mr Ekai had not made the same recommendation again.

A major stumbling block for most informants was the lack of a legal tie between the child and the receiving family. Mrs Usavia was quite clear when referring to Nelunika that the situation would have been transformed if Estelle had actually adopted her. During an interview she commented: "the child was not a legally adopted child. If Estelle dies there is no one to look after the child. If she is in a children's home then she [Estelle] can go and see the child there and help her. ... If [Estelle] had said will adopt, would handover child. [The] child [is] in need of care and protection."

Mr Hatarai agreed with Mrs Usavia in Nelunika's case, and Mr Dekai put forward a similar argument in respect of Leela. Leela's parents were separated and she had been placed by her mother with distant relatives, Roshani and Izeth. The police report filed with the court suggested that "the residents of the house [Roshani and Izeth] harassed her." On the other hand, there was some agreement that Leela had on the whole been

well treated. Her father, who said that he did not like the idea of Leela being placed by her mother, and that he had not known the family, also went on to say “Now I am not angry, they were good people.” Mr Dekai, agreed that Roshani had been generally kind to both Leela and her mother. Leela’s own stated preference was to go back to live with the family.

Nonetheless Mr Dekai opposed the idea that Leela could continue to live with Roshani. He said that she “had not done anything” for Leela, that she had only deposited money for her after the court proceedings began. Leela, he said had not been sent to school, she had not been treated as a child of the family. If however Roshani had been prepared to adopt Leela then the position would have been different. Mr Dekai said that he had in fact advised that she should adopt Leela (despite the fact that as Muslims it would be extremely unlikely that they would do so). Anything short of adoption was, he said, unacceptable; without being adopted Leela could end up as the long term servant of the family.

The rationale behind the demand for the existence of a legal relationship between child and receiving family could not be justified on the basis of the existing legal structure. However it seemed to be felt that adoption could safeguard a child by means of an external assessment of the placement, even the one off assessment involved in adoption proceedings. The corollary was that informal placements were delegitimised in the Specialist Court, with the possibility at least of adverse consequences for some of the children concerned. Instead of being in an informal environment, they could

find themselves in a children's home.

### **The Other Side of the Story: Children, Parents and Receiving Families.**

As discussed in Chapter 3, in 1930s and 1940s “quasi adoption”, or the informal placement of children, was considered to be generally beneficial. According to Sessional Paper II the children of parents “in indigent circumstances” often received “kindness and consideration” (1935a: 8, 11). The authors of the report gave an example of a “poor helpless woman whose only relief lay in some kind hearted persons” taking care of the children for whom she was responsible (1935a: 13). In this analysis all the parties, children, parents and receiving families, are portrayed in a sympathetic light.

But there was also concern about the developing phenomenon of members of the urban classes receiving children who were, it was felt, more likely to be abused. In the debate on the Adoption Ordinance in 1941 (Sri Lankan Government Hansard 1941) the situation was described as involving “persons who would not in earlier days have thought of employing servants...[and who] have begun to get hold of [children]... and these children who are often of tender years, are used for domestic service. We have thus come across cases of great cruelty”.

Reflecting international discourse these concerns have increasingly displaced the positive image of informal placement in the Colombo model, with the adults,

particularly the receiving family, being treated much less sympathetically, and the children understood as victims. As mentioned in Chapter 4, Goonesekere argues that informal placements are invariably exploitative, and is concerned to find that they continue to be legitimated through notions of patronage such as those expressed in Sessional Paper II (1996: 24; 1993 a: 10; 1993 b: 8). Weeramunda also condemns receiving families (1983: 78-79) but takes a more equivocal line on the way informal placements are justified, referring to safeguards within the existing cultural system. These include the positive valuation of patronage as a duty owed by those higher up the social or moral hierarchy, in return for deference from those lower down (see Chapter 4).

It should be noted that the ideas mentioned here and in Chapter 4, are specifically associated with the majority Sinhala community, although the close relationship between Sinhala and Hindu values are reiterated by some authors (for example Gombrich and Obeyesekere 1988: 12). I have chosen to focus on Sinhala values because the majority of the children, and all but one of the receiving families that I spoke to in the Colombo area, came from this community. Of the children in informal placements (where details were available) Jacinta, Jeyaraja and Niranjana came from a Tamil background, and Eliza, Leela and Safia were Muslim, the rest were Sinhala. In the rest of this chapter I will discuss the views of these children, parents and receiving families, compare them with ideas expressed by other informants, and where relevant point to broader social values with which they may be associated. I will begin with the accounts of some of the children that I met.

## Children.

In court Soma gave a most graphic accounts of his experiences in an informal placement, and in so doing he made it absolutely clear that he did not want to go back to the house where he had been working. One has only to read his statement, given on oath, to understand why. He worked, he said, an 18 hour day after he was

“...taken to this gentleman's house... As far as I remember I came to this house in 1995. Initially I was treated well. Then they started scolding me. Little by little they started harassing me. Then even if a small mistake by me they started hitting me. I told them I wanted to go home, but never taken home.

They hit me with a door pole. I have marks. [They] hit me on head and caused injury, head split [open] twice. Not treated. Eventually with time [the wound] healed. I sweep the house, the garden, I clean the drains, I sweep around the drains. There are about five or six rooms in the house, I sweep them all. I work in the kitchen.

I do all the other work. I scrape coconut, clean onions, clean kitchen hearth. They don't allow me to be even for a second. In the morning I am given a few bread crusts along with bread slice. I am given lunch

only after they inspect my work. I have my lunch only around 3 or 4 o'clock in the evening. It is mostly bread that is given in the night. I never ask for more food even though hungry. I clear the dining table. I fetch water from the well. They don't allow me to take water from the tap saying the electricity charge [to pump water from the well] is more. I sleep outside of the house.

The woman who works there also beats me. The mistress of the house is scared of her as well. The mistress obeys her. The gentleman is OK. He scolds the servant woman. I can write a little bit but not fully. I want to go back to my father. We have a second mother, she is also OK. I want to be with my father.”

Soma's experiences conform to all the expectations of policy makers and the officers of the Specialist Court and justify some form of intervention. He was assaulted, and he was underfed and overworked. He had been miserable, but he apparently felt that there was no choice but to stay where he was.

If Soma's experience was stereotypical, I met other children who had been dissatisfied with their informal placement for different reasons. Nandani said that she went to live with the Bandara family because she did not want to go to school. She also commented that she had been told that Mrs Bandara would teach her cookery, and perhaps would also send her abroad. Nandani said that she had not liked living with



the family; they “harassed” her, the gentleman beat her (she also suggested to Mr Ekai that he had made a pass at her, but Mr Ekai dismissed this as a possibility “he is a diabetic and gets giddy”) and when her aunt came to visit conditions would change. She complained that she had not been taught to cook by Mrs Bandara, instead she had had to watch her and learn that way, nor had she been paid for what she had done. In sum, she was glad when action was taken to remove her, although she had not thought of leaving herself.

Hema, on the other hand, now aged 18, had decided to leave her receiving family of her own accord, because there was “so much work”. When I met her she was living in a certified school, having been put there as a result of court proceedings. I spoke to her in a recreation room at the school, along with four other girls (but no staff). Before being sent to the school, Hema had been living with a *mudalali* (merchant) and his family, and had worked in his boutique. Hema had been with the family for over 10 years before she ran away.

Although Hema had been placed when she was 3, she said that she only started work in the boutique when she was 10. Before that she had been sent to school. Hema commented that the other children of the family had gone to boarding school, and that she had said “I want to go to school” and she was sent up to Year 6 (age 10-11). She also confirmed that the other children did not have to work, but said that she had not thought anything of this distinction, what she objected to was the amount of work.

One child who did notice a difference in treatment was Sudharma. Sudharma was now an adult and she had, through contacts, asked to speak to me, to tell me of her painful past. Her father and mother had had an acrimonious and violent relationship, and had separated many years before, leaving Sudharma in the care of her father. He came from a “propertied” family, but he was also an alcoholic and spent all his money. He placed Sudharma, when she was 11 or 12, with a school teacher and her family. Here she was sent to school, but was also expected to do housework. Sudharma expressed deep unhappiness about the time that she had spent with this family, although she recognised that they “were not so bad.” She had noticed that the child of the family (who was adopted) was treated more favourably. That child was encouraged to do school homework, while Sudharma was not. Sudharma was also the only one expected to do housework. Eventually her grandmother had managed to remove Sudharma (there was no official intervention), and she went to live partly with relatives, and partly at a convent school.

The experiences of Soma, Nandani, Hema and Sudharma suggest that children in informal placements can be abused physically and emotionally. They may be exploited, made to work hard, and left unpaid. Many, but not all, of the children that I spoke to had similar problems. Nelunika, for example, who had lived with Estelle for eight years spoke of her with some affection, although she said that she was glad that she was now in a children’s home. She said that she had liked Estelle and the two other children who lived there, but she had not liked to work. Mariposa, now an adult, who had been brought up on the street, said that she would not put her own baby

daughter through the pain of an informal placement. On the other hand, Lakshmi's mother, who had also been brought up on the street and worked as a domestic servant when a child, said that she had liked the placement, which she had left at 13 to be married off by her father. Anoja and Sirimavo, who were Hema's contemporaries at the certified school, were also more positive about their previous placements.

Anoja said that she had been in the certified school for three years, and before that she had stayed in a house. She had come to the house, in Colombo, because she had been lonely at home, after her father had put her siblings in informal placements on her mother's death. Anoja said that she had not wanted to stay with her father, so she asked an uncle to find a place for her. When at the Colombo house she looked after an 18 month old baby, feeding and playing with her while both parents were out at work. I asked her "did you like it at the house?" Anoja said "Yes". "Why?" "Because the people were kind, but now I like to be here and [to] find a job." It is important to note that both Anoja and Nelunika commented that they were glad to be where they were now (that is in an institution) equally though they were fairly positive about their previous placements. Sirimavo aged 14, on the other hand, was unequivocal. She had liked where she had been living, as is apparent from what she said during her interview:

I asked her whether she had lived in a house, before coming here. Sirimavo said "Yes, [I] had been taken over [by a lady]".

"What did you do there?" "[I] used to play, to sweep, [I] used to help the lady in the

kitchen work.”

“Did you like it there?” “Yes the lady was good to [me].”

“How did you come to be there” Sirimavo said she was “left and gone” (that is, abandoned). “An elderly lady [*achi*] gave me over to [the] house.”

“Where did you sleep?” “In the lady's room on the floor.”

“Were there other children there?” “One other child lived there, the other is married.”

“Was the child living there elder or younger?” “Elder.”

“Did she- the other child- go to school?” “Yes, [she] went to school.”

“Did you go to school?” “The lady of the house [gave classes] [I] was in class, [I] learnt the alphabet.”

“Did the other child do work?” “No, helped the mother to cook.”

“Did she do as much work as you?” “She used to do more work than [me].”

Sirimavo's experience does not conform to stereotype of children in informal placements as exploited victims. She was happy where she was, she did not apparently feel that she was treated differently from the other child in the house. She was also, to an extent, educated although it was not a formal education. Her placement could be understood as a fostering rather than an employment arrangement. Nonetheless she was placed in a certified school, on the strength of a petition sent against the householder.

When proceedings began, Nandani told Mr Ekai that she did not want to go back home, and that she wanted to stay in a children's home in Colombo. Her ideas may

have been changed by her experiences at the certified school - the same institution in which Anoja and Sirimavo were living- where she was remanded during the proceedings. She told me that the teachers there were “very severe” and punished the children by making them kneel on the ground and wait, sometimes from morning to evening. By the time I spoke to Nandani she was back at home and seemed wholly reconciled to being there. She said that she was going to start back at school the following January, “If [I] get an education and a job then [I can] add money to that [compensation] money and build a house for myself my fathers and sisters.”

It seems that Nandani was prepared to accept the ideas expressed by the authorities about education; but at the same time she was eager to earn money, and had gone to the Bandara family as a way of earning and learning, which brings me on to another point. Many of the children I spoke to, or whose cases I followed in court, had not necessarily chosen to go to an informal placement, away from their blood relatives. Nelunika, for example, at 3 was in no position to decide one way or another. However, some of the older children had made a positive decision to go to another household. Nandani was one, although life with the Bandaras had not been what she expected. Jacinta was another. As she told the police when they detained her “because [it was] difficult to exist without income she had come to Colombo to be employed in a house”; in other words, she needed a job. Both these girls had perceived that an informal placement with a family would meet their needs; Nandani for training and Jacinta for an income. To this extent then neither were the passive recipients of adult decisions, as might be expected of children categorised as “child domestic servants”.

Nor were the children in this category always passive when in the placement, take Nalani for example. Nalani had come from a sad background. She was from the east coast of Sri Lanka, from an area badly affected by the civil war. According to the principal of the certified school she had witnessed her mother and aunt being shot. Her father had subsequently remarried, and an arrangement was made by another aunt for Nalani to live in a house in the Colombo area. Here she was badly treated; when asked, she said that she hadn't liked the place because the lady had hit her. Nalani, failing to conform to the stereotype of child as victim, told a neighbour what was happening and the neighbour took her in. This woman treated her well "I didn't work and they were going to send me to school". She was sad to leave, but was forced to because a complaint was made, by the original employer.

It is significant that I spoke to Nalani at the certified school in the presence of the principal who was eager for Nalani to list the benefits she had gained from coming to the institution. Nalani obediently said that she had learnt to sew, write and to cook. Nonetheless Nalani made it clear that she had been happy in the second informal placement and had been unhappy to leave it, which suggests both that it is possible for children to be positive about their placements, and also that they are prepared to express opinions that may be unpopular. Equally Nalani was prepared to take action to leave a placement that she did not like. Several other children, whose cases I followed up, also ran away from informal placements, and others lodged complaints with the police about their treatment. One of them, Dharmapala, had only been living away from home for a month when he left. He told the police that he did not want to

be there any more. When the case was heard in the Specialist Court the householder told Mrs Usavia that Dharmapala had been well treated. Almost on arrival he had developed a skin complaint, and this had received medical attention, at some expense. When Dharmapala confirmed that this was true, Mrs Usavia rather surprisingly criticised him for running away, suggesting a degree of discomfort with children who are active rather than passive.

Contrary to the ideas of child servants expressed in the Specialist Court, and in the Colombo model, not all the children whose cases I followed could be seen as the passive victims of adult exploitation. Some had actively chosen to be in an informal placement. Others had reacted to placements that they found intolerable. Still others had been well looked after and on the whole had been happy where they were. The variety of experiences these children went through underlines again the variable nature of what is defined as child domestic service, and the difficulty of treating the children concerned as a homogenous group. These experiences also suggest that relations between elders and children, rich and poor may not simply be conceptualised in positive terms, they may, in certain instances, be experienced in positive terms.

### **Parents.**

Mr Dekai and OIC Gama both stressed the importance of poverty in causing parents to put children in informal placements. To this extent they shared Weeramunda's analysis, expressed at the ILO workshop, that "As long as poverty continues so will

child labour” (1996:1). Poverty, Weeramunda suggested, created conditions which led to children working, for instance, the absolute necessity of a family treating a child as an economic resource. Goonesekere, on the other hand, argued that this was an “oversimplification”. Not all the children of low income families work. She identified other factors, adult neglect and abuse, and family disintegration, as combining with poverty to produce the phenomenon of child labour (1996: 24). In this way, child labour, including domestic service, becomes the problem of “dysfunctional” families.

Table 4 (overleaf) on family circumstances suggests that the majority of children in informal placements did come from homes where the nuclear family unit had “disintegrated”, or never existed. Whether this was a poverty plus factor in pushing children towards placement, or a symptom of poverty, or indeed is an irrelevant factor, is less clear. Dharma’s father and Leela’s mother gave what might be understood as economic explanations for their actions, when they said that they could not support their children. Chamilla, Nalani, and Nelunika, on the other hand were all placed by relatives, suggesting that they were either unable or unwilling to care for the girls. There also seemed to be a fairly high level of acrimony between some of the parents who had separated. The fathers of Leela, Mahinda, and Soma all accused their ex wives of being of “bad character” who “went with other men” or who were “prostitutes”, suggesting tensions which may have contributed to the informal placement of their children.

Interestingly OIC Podi Nuwara put another spin on the causes of child service. She



**Table 4. Family Circumstances of Children Found in Informal Placements.**

Child's Name	Parents Together	Parents Separated	One Parent Dead	Both Parents Dead	Single Parent	Not Known
Anthony						x
Asita						x
Bel				x		
Chamilla			x			
Dharma		x				
Eliza				x		
Godfrey						x
Jacinta	x					
Jeyaraja			x			
Leela		x				
Mahinda		x				
Nalani			x			
Nandani		x				
Nelunika					x	
Niranjana		x				
Safia			x			
Siriyawathie	x					
Skanda						x
Soma		x				
Sumana						x
Tilak			x			
Vikrama	x					
Total (22)	3	6	5	2	1	5

suggested that parents used the system of informal placement in “an organised way”. She said that parents place a child, and “take a lump sum, [for the placement], before a month is up [they] tell child to cry and say want to go home. [Then they take the child] and place him or her in another home.” She commented that the parents had not committed an offence, so there was no come back on them. There needed to be some way of punishing parents for these activities, she felt. No other informant made a similar comment, and it is impossible to tell from the data available whether it is in any way accurate. What the comment does do is suggest that the OIC perceived the parents of children in informal placements in a particularly negative light, even more negative than the portrayal of child workers as coming from dysfunctional families.

Not all the parents, though, had negative (or fraudulent) reasons for making or supporting informal placements, and the fathers of Jacinta and Soma are examples.

Jacinta’s family (the Ponnambalams) lived in a line room on a rubber estate about a three hour drive from Colombo. Line rooms are very basic tied accommodation provided on estates for worker’s families. The line room occupied by Mr and Mrs Ponnambalam was no exception, being subdivided into two small rooms in which the family of five lived.

Mr Ponnambalam gave two main reasons for sending Jacinta to work with the family of Charles Seneviratne in Colombo. He said that Jacinta had failed her 7th grade in

school (grade 7 corresponds to age 11 or 12) and that she was ashamed to go back. Because she wasn't at school he felt that "for a young girl alone here [it was difficult] so that when this possibility came up, he thought he wanted to take the opportunity." In addition, Mr Seneviratne had told him that Jacinta would be sent to sewing classes.

Goonesekere suggests that the plantation sector is a traditional source of child labour, in part because education facilities have been poor for decades and "consequently aspirations for upward mobility through education could not be fostered to prevent children from being perceived as an economic resource for the family". Mr Ponnambalam's account of the reasons for Jacinta's employment is not as straightforward as lack of aspiration, or using Jacinta as a source of income. A key problem was that she had failed at school and could not be left alone at home, because she was believed to be vulnerable. It is true that the family were extremely poor, both parents had only part time employment, but access to sewing classes, even to service in a middle class home, must in these circumstances constitute a form of aspiration. Mr Ponnambalam also presented as a concerned father, he had known of the Seneviratnes before Jacinta was employed by them, he had visited Jacinta in Colombo, and he had employed a lawyer to obtain his daughter's release from custody.

One might be forgiven for thinking that Soma's father was not particularly caring. He was unapologetic about arranging for Soma to work in the Colombo house, indeed he was pleased that his son had been got to work. He had been unable to send Soma to

school because, as with many receiving families, he did not have Soma's birth certificate following his separation from Soma's mother. Instead Soma spent his time "plucking coconuts and being mischievous". The estate superintendent had complained about Soma's behaviour and Mr Perera had arranged Soma's placement through the estate manager. It was much better that Soma was doing housework Mr Perera said, it was better than "idling".

There was no suggestion that Soma's placement had been arranged because of poverty. Mr Perera had been in his present job for nine years and the accommodation provided for him was more comfortable than that of the Ponnambalam family. On the contrary Soma had been placed because it was good for him, and because he had been assured that would be given training in "big companies." He felt that Soma's master was "a good man, firm and strict" who had given Mr Perera advice. The only problem with the placement was the behaviour of the woman servant who had mistreated Soma.

Mr Perera also said that he had done the same thing when he was 15. He had gone to work in a house for someone who worked in the fisheries, and it was because of this experience that he had sent Soma to Colombo. He argued that a beating "once in a way" did no harm. His father had whacked him as a child, causing him to have to wear bandages on his eyes for three months. In an almost pythonesque parody of himself, Mr Perera claimed that if he (Mr Perera) had been molly coddled at home he wouldn't be where he is now.

The general impression that Mr Perera gave was that the court process had washed over him, without changing his attitude to Soma and the benefits of working in a house. He said that he was still hoping to send Soma “for training”, which was the same phrase that he used in connection with Soma’s last placement, suggesting that he had not taken to heart the magistrate’s admonishment that he should not to send Soma for domestic work.

Both these parents gave positive reasons for placing their children where they did. They justified the placements as a way of providing for the future through training or character development, and in Jacinta’s case, Mr Ponnambalam suggested that it offered her a degree of protection unavailable at home. The same idea of protection seems to have been behind Siriyawathi’s placement in a house in Colombo.

Siriyawathi was 14 years old. Her father was a brick maker and the family lived in a village in the south of Sri Lanka. She had been raped by a neighbour from the village and criminal proceedings against him were ongoing. Her mother said that she was frightened for her daughter, and that she had placed her with a family in Colombo, where she had been happy. Siriyawathi’s mother did not mention it, but there had also been criminal proceedings against her father, who had assaulted his daughter with a knife. In these circumstances, it would seem to have been a good idea for Siriyawathi to be away from her home area, and in the anonymity of Colombo. Her mother said that she either wanted Siriyawathi to go to a children’s home, or to stay with the receiving family. She herself had been very satisfied with the family, but she felt that

the court would put her in a home.

The idea of benefit, in which child placement is seen not as a purely economic arrangement but as giving some form of advantage to the child, was also expressed by Mahinda's parents. He was only 9 when he was placed by his mother (Gameela) with Mr and Mrs de Almeida. She told the police that "I gave my son over to a lady not known to me, she promised that she would bring him up as a son. Having signed a piece of paper I gave my son over. The lady lives near eye hospital junction and I reside at [address north of Colombo]." Gameela seemed to think that she was giving her son into some form of fostering, that he would be brought up as a child of the family. She also seemed to view this as a semi-official transaction, in which she had signed her son over to the de Almeida family. The same was true in the case of Mariposa's mother. Mariposa (who was now grown up and married) had not been involved in court proceedings, but her brother was one of the children brought before the Specialist court when I was there. I spoke to her mother who told me that she had given her daughter to a family in the east of Sri Lanka when she was 7 years old. Beatrice, who had lived on the streets of Colombo for 24 years, said that she had thought that her daughter would be well treated (she was not) and that she would have "a better life" than if she had stayed in Colombo. The idea that "some good may have come" from an informal placement, was also expressed by Mahinda's father, suggesting that some parents thought that their children's interests would be promoted by such a placement, and that these arrangements were seen as a way of the children being brought up, as distinct from an economic arrangement.

I was not able to get any information from the mother's of other children who had been placed at a young age, mothers such as Nelunika's, because they had long ago lost contact with their children, but it is possible that they too saw the placement of their daughters as a form of fostering rather than exploitation. Indeed the very fact that the mothers had lost touch with their children is indicative that a form of "adoption" had taken place in these cases. As with the statutory form of adoption, the receiving families would be unlikely to encourage further contact between the children and their blood relatives, precisely because they wanted to "take over" the child as their own, without ties. This view was expressed by Mrs de Almeida of Mahinda. When I asked her whether Mahinda's mother had visited him while he lived with the Almeida family, Mrs de Almeida replied that "the mother had not visited. [She had been] advised not to [because] the boy might want to go back [home]."

However not all the children lost contact with their families, contrary to the international model of child domestic service discussed in Chapter 2. Jacinta and Nandani for instance were living with receiving families already known to their parents or relatives, and in both cases the receiving families had visited the childrens' own homes. Siriyawathi and Leela had also remained in contact with their mothers. These instances would suggest that not all children treated as being domestic servants, did lack family support or interest.

Whatever the effects on the children, the data suggests that most parents responsible for placing their children tended to portray placement in a positive light, and to treat

it not simply as an economic arrangement, but one involving positive benefits to the child. To this extent their perspective remained that of the authors of Sessional Paper II (1935) who saw “quasi adoption” as “generally beneficial”, and was in contrast with the dominant ideas expressed by the probation, police and court officials that they encountered. These views could also be seen as reflecting ideas of a social order, mentioned above, in which different sections of community are expected to describe their relationships in terms of harmony and friendship.

Risseeuw, in her analysis (mentioned in Chapter 4), argues that this smooth social surface masks an underlying resentment between rich and poor, usually not verbally expressed, but acted out in “forms of resistance” such as (in her research) petty theft and cheating (1988: 247). Spencer, in contrast, found little to suggest actual disharmony between rich and poor, although resentments existed within these social groups (1990a: 193). In Spencer’s terms the responses of Mr Ponnambalam (“we have faith in the gentleman [Mr Seneviratne]”) and Mr Perera (Soma’s master was a “good man”) may represent the way they do conceptualise the relationship, and not simply the conventional response of individuals in what amounts to a patron client relationship. On the other hand, some parents and relatives who were not responsible for child placement, or where placements had gone wrong, felt able to express more negative ideas the practice. Leela’s father said that he was opposed to his daughter being given to the Hussein’s, and added that parents should not give up their children. Mariposa’s mother, who had hoped to give her daughter a better life, said that instead her daughter was ill treated. In these instances individuals seem to have been



expressing (or perhaps reflecting) the dominant ideas about child placement current in the Specialist Court system, and perhaps using this terminology as a way of expressing their resentments, as one of Risseeuw's "forms of resistance".

### **Receiving Families.**

If parental expressions about informal placements were both positive and negative, those of receiving families were also variable. Some made no bones about the fact that they simply wanted somebody in the house to do domestic work, while others portrayed the relationship as a type of informal fostering.

Charles Seneviratne explained that he had employed Jacinta because they had no help at home. Jacinta had come on a trial basis, to see if his children, aged 5 and 9, accepted her. Mr Ponnambalam was given an initial lump sum and 750 rupees at the end of the month, some of which he gave to Jacinta. The relationship between Jacinta and Charles was that of employer, employee. There was no suggestion that he was offering her a family home. At the same time though there was some blurring of boundaries. Charles said that at first his 9 year old had been jealous of Jacinta. He had told the child that you must treat Jacinta "like an elder sister", and that after that there were no problems.

Although Charles was employing Jacinta as a servant, he conformed to the dominant discourse in that he said he was opposed to employing a child who was at school.

Since Jacinta had left school he thought that taking her was acceptable. He also commented that he had not known that the age of employment had changed, which of course it had not. He had been caught by the interpretation of existing legislation which prevailed in the Specialist Juvenile Court.

In contrast to Charles, Estelle and Adele seemed to see Nelunika and Niranjan as foster children rather than employees. Both expressed affection and concern for the children who had been removed from them. Estelle said that she had wanted Nelunika as a companion, that she had taken her because all her daughters were growing up. After Nelunika was removed, Estelle said that one of her daughters had moved in with her because she was on her own. She claimed that Nelunika had called her mother, and her daughters sisters.

When Estelle spoke about Nelunika she did not seem to be describing a servant. Equally she had not treated Nelunika as a child of the family, quite. She did not, for instance, want to adopt her. Nelunika's status seems to have been closer to a "child in between" to use the phrase with which Mrs Bandara described Nandani's position in her household. The distinction between a child of the family and a "child in between" is well illustrated by Mrs Hattah's account of the two children that she had taken into her family.

Mrs Hattai was a school teacher from Western Province whom I met through contacts quite separate from the Specialist Juvenile Court. I had wanted to talk to her because

I understood that she had adopted a little boy, and I wanted to discuss her reasons for doing so, and her relationship with the child. She confirmed that she and her husband had adopted Ralph when he was 5 months old. She said that he was now 5 years old. Ralph had been given up by his biological parents, a well to do middle class couple, because they felt, in astrological terms, that he had a malefic effect upon their relationship. This analysis was later confirmed by an astrologer. Apparently the couple had been arguing violently since he was conceived, and they felt that they could not care for him. The mother had specifically asked Mrs Hattai to adopt him. She was initially reluctant, but after seeing the baby, she had agreed. Mrs Hattai said that Ralph did not know that he was adopted, although her two adult daughters knew, as did her neighbours. She commented that it might be a good idea to tell Ralph, before somebody else let him know.

I was interested to find out from Mrs Hattai more about the impact of astrology on child placement, so I asked her whether parents ever placed their children as servants or companions for reasons associated with astrology. She replied that “such children are given because of poverty”, as opposed to astrology, and went on to give an example from her own experience. She told me that she had recently taken in a 10 year old girl, Mary, as “somebody to help her and to play with the boy [Ralph].” Mary was, she said, a “companion on a different basis”, she would “feed and clothe her, send to school,” and get her to “sweep the house, do some minor duties.” What Mrs Hattai seemed to be saying was that Mary had quite a different status in the family from Ralph. Both children had been brought into the household, but for distinct

reasons. Ralph was to be adopted, but Mary was to be a companion. I asked Mrs Hattai why she had not adopted Mary. She said that “[Mary] was too old and did not come from the right upbringing, [she] could not introduce the girl as her own daughter.” Upbringing, Mrs Hattai said, was nothing to do with caste, it was simply that Mary’s behaviour “was not up to the level expected.” The distinction between the children seemed to be based on the fact that Ralph, at 5 months, could be socialised as a member of Mrs Hattai’s family, and be accepted as such by friends and neighbours. Mary’s age, background (as well as continuing contact with her family) prevented this acceptance, so that she could only ever be a “companion”, albeit one that was cared for and educated at least until she was adult. Mrs Hattai said that she would not adopt Mary, but that she would educate and train her, and then “she could find her own future.”

It is arguable that Mrs Hattai’s perspective on Mary’s position within her family is consistent with ideas of patronage identified by both Goonesekere and Weeramunda as important in connection with informal placements. Goonesekere’s argument that notions of patronage are used to legitimate the exploitation of children may have been true in cases like Chamilla’s (see above), but it is harder to argue in a case such as Mary’s. I would suggest that Weeramunda’s analysis comes closer to the situation experienced by Mary, Niranjana and Nelunika. They were not treated exactly as children of the family, but equally they were not made to work long hours like Soma. There was no suggestion that they were ill treated (although it was not possible to verify this with regard to Mary), and while Niranjana was barely old enough to attend

school, provision was made for Mary and Nelunika to be educated. The actions of the adults concerned with these children expressed a sense of responsibility towards the children, consistent with the ideas of appropriate social relationships discussed above. However, this sense of responsibility seems to go further than simply a conventional response, and act, as Weeramunda suggests, to structure the way that Mrs Hattai, Estelle and Adele behaved towards the children in their families.

Because of their status as potentially illegal, these types of arrangements are vulnerable to external intervention. This vulnerability was often exposed by a peculiarly Sri Lankan institution, the petition. Petitions normally take the form of an anonymous telephone call or letter setting out circumstances which cause concern and requesting official action. Petitions are not unusual, as my research in the Specialist Court suggested. Of the 28 cases of “child servants” looked at, 6 came to court as a direct result of a petition. The unsigned letter sent in Nelunika’s case is an example of the type of information given:

“ Dear Sir,

According to an ad published in the paper I need to bring to your attention this information. That ad was published because of world children's day and there is a house near by which employs a small child and she does all the house work. I estimate her age of 12 years. She indicates a liking to go to school. I see her looking at school

children longingly. Please investigate her whereabouts and do some justice. Whenever I see her she goes on errands. I feel that it is very dangerous. All the people in the house seem to punish her often. I appeal to you to investigate and to give some relief to this innocent girl. Below I give the address of the house- address. Instructions how to get to it- walk close to the new magistrate's court and there will be a two storey house, pass it. Child's name is Nelunika."

It is significant that this petition was apparently sent in response to World Children's Day, an event used by policy makers in Colombo to promulgate their message on child labour, a message that the writer had clearly taken on board (see for example Ranasinghe (1.10.1993) "Universal Children's Day: Child Labour", Daily News Supplement). The sending of a petition though, is more complicated than an action by a concerned citizen in the face of possible child abuse. Petitions may be seen to play a role in the social relations between individuals.

Of the receiving families spoken to, both Estelle and the Hussains (who had taken in Leela) expressed the view that petitions had been sent about them because of "jealousy". Similarly Mrs Bandara suggested that the petition(s) sent about Nandani had been sent by a disgruntled ex-employee. She described the sequence of events: "Another male employee, 36 years old, did clerical work [for us]. [He] had been here a year when Nandani came. After a few months Nandani forced [by him] to become friendly. [She was] not mature enough to get involved, [she] told us what he said, we

teased [her]. After two months he said to Nandani, [that he would] take her away, and employ her in a garment factory. At the end of May he said to her on June 1 [he] would give her this job. When Nandani told us this we scolded him. She has family- we will have to answer to her family. [We] can take you to court. He said we'll see who will go to courts...This man has got petitions- two or three petitions. We didn't keep him [in our employ]. He was angry.”

Spencer noted that in Tenna “jealousy” (*irisiyava*) was frequently given as the reason for an antisocial act, by the target of that act (1990a: 175). “Jealousy” in this sense means the resentment of what is perceived to be the individual’s good fortune. It is complemented by the notion of “false pride” (*adambara*) which is attributed to those who are felt to consider themselves to be better than their peers. Thus a person who is accused of false pride can retort that the accusation simply stems from jealousy. In this context anonymous petitions can be seen as a social mechanism for pointing out the false pride of family who presume to have servants, and one which precludes the accuser from having to break the smooth surface of social relations, or to deal directly with the charge of jealousy.

The vulnerability of informal placements to the effects of petitions is reinforced by the attitude of the Specialist Court authorities. By their nature, petitioners cannot be brought to court, because they are anonymous. As OIC Gama said in relation to Nandani’s case, “The callers never tell us who is speaking”. However this did not cause her concern. She said that she was not so worried about who gave the phone

call, “she only cared if the story was true” that is that there was a child living in an informal placement, rather than that the allegations themselves were true. In Nandani’s case she went to the house and spoke to the Bandara family. “Nandani’s mother and father were not there. [The householder] was not the legal guardian. Nandani was under 18 so I took her into custody and recorded her statement.”

The effect of the practice of sending petitions is to bring cases before the Specialist Court, where as informal placements, they are defined as illegal. In addition, children in informal placements are understood to be servants, and the responsible adults to be employers, if not exploiters. As a consequence, the alternative ideas, expressed by receiving families, as well as children and adults, are excluded in the court process, in favour of the Specialist Court model of child domestic service.

## **Conclusion.**

In the introduction to this chapter I said that my preliminary research had suggested that the Colombo model of child domestic service was dominant in the Specialist Court practice. However a more complicated picture of children, child placement and child work, emerges from the detailed research discussed above.

The basic response to children in the Specialist Court is structured by the existing legislation, in particular the wording of section 34 of the CYPO. However in addressing the question of children and education, and the situation of children on the



street, the Specialist Court interprets section 34 so as to extend its scope. The authoritative judgment given by the Court of Appeal in the Perimbarajah case is not referred to, and education is treated not simply as a parental duty, but as grounds for interference with parental custody. In the same way the definition of “in moral danger” which is specifically aimed at children who are on the street as beggars, as destitutes, or because they have no fixed abode, is applied to children on the street for whatever reason, so that the number of children who may be brought within the ambit of the juvenile court is considerably increased.

A process of *reinterpretation* can also be identified, in which child workers are redefined. The opportunity for reinterpretation is created by the police practice of bringing child workers to the juvenile court as children in need of care or protection. It is confirmed by the Specialist Court’s practice of accepting jurisdiction in such cases. These practices occur in a context in which strong opposition to child work is expressed, reflecting I would suggest, the Colombo model of child work which treats all work as exploitative of children. Significantly though, Specialist Court practice goes beyond the expectations of policy makers by opposing children working at 16, and some informants argued that children should not work before they are 18. When this is combined with the perception that working children in Sri Lanka tend to be servants, an idea promoted by the Colombo model, the logical outcome is that children who are found working are not recognised as fully fledged workers, but are collapsed into the category of “child domestic servants”. This is precisely what happens in the Specialist Court with children found working in factories, bakeries and

elsewhere being labelled “servants”. The consequence for boys such as Ganesa and Amirthalingham is that they are removed from gainful employment. Bala too had to spend a night in detention. It could be argued that the treatment these children received treads a fine line between protection and harassment.

Children in informal placements undergo a similar process of transformation. Proceedings under section 34 (CYPO) define them as children in need of care or protection. This definition is given substance by the association of informal placements with negative ideas about child domestic service. This association was made as far back as the 1930s, but in recent years has taken on new characteristics. One development has been an acceptance of the view that all children who are domestic servants suffer from abuse. This construction is central to the Colombo model of child work, which is reflected in the media representation of children. The particular abuse of child servants is seen to stem from their physical and sexual vulnerability, and also from their lack of access to education and loss of family. It is a construction which seems to have been accepted by many informants in the Specialist Court.

Another new development is the perception, demonstrated time and again in the Specialist Court, that all children in informal placements are domestic servants. It is made explicit in the labelling used, “servants” and “employers”, in the almost invariable outcome- the return of the child to his or her parents- and the concomitant rejection of alternative explanations of the purpose of the placement.

When these developments are linked together, the basis for the Specialist Court's interpretation of section 34 (CYPO) becomes apparent. Children in informal placements are redefined as domestic servants, joining child workers in one, all embracing and negative category. Different types of relationships and experiences are lumped together under the heading of domestic service, with the result that all children in informal placements have to be removed. For some this can be seen as offering a measure of protection, although based on the idea that children are victims, which is hardly an empowering image. For others (fewer) it amounts to a denial of their wishes as well as interests.

A major failure of informal placements is that they do not reproduce the parent child relationship in a legally recognisable way. The Specialist Court, in its dealings with children, places particular emphasis on this relationship. In enforcing this position the magistrate resorts to what may be seen as a mixture of traditions. She uses her powers under the CYPO to return to children to the care of their parents. But in commending the child parent relationship she goes beyond state legal norms. Within the Buddhist perspective respect for elders is an important part of the general hierarchical ordering of society. In requiring children to worship their parents, Mrs Usavia is restating not only the existing state legal order, but also the correct social order of a Buddhist society and the greater legal and moral order that it represents (See Geertz 1983: 195 and his discussion of *dharma*).

Side by side with this expression of a different sensibility of law and morality, is the

exclusion by Mrs Usavia and the whole court process, of different ideas about the nature of informal placements. These, as I suggest above, coalesce around notions of patronage. Goonesekere dismisses these notions as degenerate, and as no longer reflecting the social values of society. They are, she says, purely a way of legitimating child exploitation. Discussions with parents and receiving families in the Specialist Court area though, suggest that positive notions of patronage continue to exist and are used to legitimate both child exploitation and the care of unrelated children. Weeramunda argues that the relationship between working children and their employers (and in this category he includes servants) are governed by cultural ideas of the role of patron and client, and I would argue that these notions continue to have a force and value in Sri Lankan society. They cannot simply be dismissed as degenerate while they remain socially valid.

Equally they cannot simply be legislated out of existence, although as I argued in Chapter 2, the impulse of exclusion is a central characteristic of the western state legal process of which the juvenile court is a representative. Western law deals in dichotomies. Informal placements are either legal or illegal. Having been defined in the Specialist Court as illegal, they must be treated as inappropriate and penalised. This treatment is justified on the basis that informal placements fail to reproduce the parent child relationship in a legally recognisable way, and that they do not offer the child stability and support. In other words they fail to conform to the norms of family which are promulgated by the court, and the fact that they might conform to another set of norms is deemed irrelevant.

It is proposed to confirm the illegitimacy of informal placements by reviving the provisions of the Adoption Ordinance on custodianship (see Chapter 3). Children under 14 living with anyone except their parents, will have to be registered with the proper authorities; money will have to be deposited in their name; and a certain standard of care provided. If families fail to abide by these regulations they will have committed an offence and will be liable to prosecution (Adoption Ordinance Part II). The effect of such an attempt at regulation will be to reinforce the process already going on in the Specialist Court, and to deny recognition to alternative ideas of social relationships. A variety of fluid social arrangements will be re-ordered into categories and confirmed or denied, with those failing to comply being defined as inappropriate and illegitimate.

At the same time the response of the Specialist Court may not be completely predictable. Its operation is strongly influenced by the Colombo model, the level of acceptance of the relevant norms appears high amongst court officials, police and probation. However the translation of these norms in the court process does show some distortion. For instance, children are children until they are 18, therefore no child should work. Similarly the court seems to have expanded its jurisdiction to monitor the behaviour of all children on the street, whatever their circumstances. Indeed the application of the juvenile jurisdiction of the Specialist Court seems to represent an authoritarian attitude to children and childhood, in which the child on the box is acted upon in accordance with the prevailing norms.

## **Chapter 6.**

### **Mainstream Town.**

#### **Introduction.**

In the last chapter I discussed the way that children were constructed in Specialist Court practice. I suggested that there was general agreement among official informants (as distinct from children, parents and receiving families) that children should be educated and that they should not work. In practice, this translated into an interpretation of section 34 of the CYPO that treated working children as children in need of care or protection, an interpretation reinforced by the understanding that domestic servants as a group are especially exploited, and that most working children in Sri Lanka are servants. At the same time *all* children found in informal placements were treated by the child care authorities as domestic servants.

The construct which emerged from Specialist Court practice reflects, and sometimes goes beyond, the values of what I have described as the Colombo model of child work, in its promotion of education, its rejection of work, and, most important, in its confusion of informal arrangements with domestic service. But this construct also reflects the constraints of the existing legal structure. In order to circumvent the limitations of the labour law, and the anomalous legal position of informal

arrangements, working children and children in informal placements have to be defined as children in need for any form of court based intervention to happen.

The other side of the story, the views of children and families, was more complex than the relatively straightforward understanding expressed by official informants. Some children were undoubtedly very badly treated, others were not. Not all children were the passive victims of circumstances; not all receiving families were exploitative employers, although quite a few were. Condemnation of child placement tended to be expressed in terms consistent with the Colombo model, understandable if a child had been abused; actions were often defended in terms of patron client relations, although I left it open (and it is impossible to be certain) whether these were simply conventional responses (as Goonesekere might suggest), or if they did represent the way the relationship was conceptualised.

In this chapter I turn to practices in the Mainstream Court area. My research in this area provides, if not a scientific control for the Specialist Court data, then at least a point of comparison by which to assess how far the values of the Colombo model extend beyond the child care system of the capital, to other parts of Sri Lanka. To consider this point I will develop an analysis of the way that children are constructed in the Mainstream Court area. As part of this analysis I will identify areas of similarity and difference between the practices of the child care authorities in the two areas, and consider the consequences of any differences for the children concerned.

## **The Child Care Authorities in Mainstream Town.**

I have already mentioned that the Mainstream Court is associated with an urban centre, which I shall simply refer to as Mainstream Town. It had a population of about one fifth that of Colombo, according to the most recently published statistics (Sri Lankan Government 1990). The town, which is surrounded by tea and spice growing country, is an important administrative and commercial centre for the Central Province. The province itself has a special significance for the Sinhalese Buddhist population since it contains the most sacred Buddhist shrine on the island. It was also part of the Kandyan kingdom and many of its inhabitants are descendants of the “Kandyans” mentioned in Chapter 3. Equally there is a large “Indian” Tamil population mainly living and working on or near the tea estates, which are described by Goonesekere as a major source of child labour.

The structure of the child care system in Mainstream Town is very similar to that associated with the Specialist Court. Juvenile jurisdiction, under the CYPO, is exercised by the Chief Magistrate Mrs Pieris, and the Additional Magistrate, Mr Jayawardena. They both sit in the adult magistrates’ courts which are located in a court complex in Mainstream Town. The main magistrate’s court appears to be a legacy from the colonial era. The court room is large, and overshadowed by the magistrate’s bench which rises like a pulpit at one end. For morning sessions the court room is packed with litigants, defendants, lawyers and onlookers. Juvenile cases, though, are heard in the magistrate’s chambers. Mrs Pieris’s chambers are reached by



walking past the court room and detention cell, through the administration section of the court. Those of Mr Jayawardena are attached to a small court room which is round the side of the main building. Both provide a more intimate setting for children's cases than that available at the Specialist Court.

The Probation Department in Central Province comes under the multi dimensional Ministry of Agriculture, Irrigation, Environment, Youth Affairs, Social Services, Probation and Child Care, based in Peredeniya, near Kandy. In Mainstream Town itself there is a probation unit, housed in a building in the court complex, close to the magistrates' courts. Six officers work from this unit, including Mr Weerakoon, Mr Obeysekere and Mrs Wickremasinghe. Their role, as with the probation officers in Colombo, is to provide support for children and families in need; to supply information to the juvenile court on the background of children before the court; and to supervise children under court orders.

The local police Women and Children's desk is attached to the central police station in Mainstream Town. It operates from an outbuilding, and is staffed by several women police officers whom I interviewed. The desk was set up following the 1993 policy initiative on child abuse mentioned in Chapter 5. Its function, as with its counterparts in Colombo and countrywide, is to combat child abuse and to protect children who have been abused.

There is also a labour department in Mainstream Town. The district labour officers

there confirmed what their counterparts in Colombo had told me, that they did not deal with cases involving children. Only one case was mentioned, Radhika's (see below), but it was felt not to involve child employment.

Although the child care structures are similar (there is no equivalent of City A police however), and governed by the same legislation, there are some differences in child care practice in Mainstream Town. For instance, probation officers seem to place a greater emphasis on the support of children in need in the community than their Colombo colleagues. The approach of the police desk to cases of child labour also differs from Colombo practice. *Inter alia*, the desk is expected to take action to "liberate the child" from child labour and to produce children "before competent authorities for re-integration etc. The errant employer should be dealt with according to law." (Sri Lankan Government 1993). In the Colombo area this responsibility seems to be reflected in the practice of bringing child workers and child servants to the juvenile court as children in need. However, far fewer cases seemed to be taken to court in Mainstream Town. For instance, during a 5 month period (19 January to 17 June 1996) only 42 child related cases of any sort were dealt with by the Mainstream Juvenile Court (Probation Department document). This compares with 142 heard in the Specialist Court in the 21 day period of observation. Such a discrepancy suggests a different interpretation of desk responsibilities.

## **Children's Stories.**

My research focussed on how the child care authorities responded to the situation of six children. Although this is a very small sample, I would suggest that it gives a flavour of the similarities and differences in practice between Colombo and Mainstream Town. As in Colombo, I was concerned to follow up cases involving children placed in other families. I obtained most information about five children, Radhika, Anoma, Shanti, Wimala and Gamini, and these are the children I will focus on here. It was immediately apparent that the outcomes in Anoma's and Radhika's case were different from what might be expected in Colombo, as a brief synopsis suggests.

### **Children in Other Families.**

#### **Radhika and Anoma.**

Radhika was a little girl of about 9 and was of Tamil origin. She was living with the Pereras, a (Sinhala) army family and had been with them for around five years. Before that, Radhika had been living with friends of the Pereras, another army family. Mr Perera's friend had apparently stopped some adults at a military road block and taken Radhika into his custody on the basis that the child was going to be "sold to foreigners".

It was not clear whether Radhika had been going to school. What was clear though was that she had no formal legal status in the Perera family. Nonetheless she was allowed to stay with them, following a probation investigation instigated by an anonymous petition.

I did not meet Anoma or the Bandara family with whom she was living. Anoma's situation had apparently come to the attention of the police desk as the result of a petition. This had suggested that the woman of the house was a prostitute and that Anoma was kept as a servant. In order to investigate the case, a police officer was sent to the house. She spoke to an older woman, Anoma's "grandmother", who said that Anoma (aged 7) was distantly related to her daughter and that the daughter and her husband had taken her in "for adoption". The grandmother also said that the family was trying to send Anoma to school. The officer also spoke to the neighbours who said that Anoma was well cared for, and noted that Anoma seemed very friendly with the family. It was concluded that Anoma was not treated as a servant. The case was referred to probation who apparently took the same view, and Anoma was left in the care of the Bandara family.

On the other hand the experiences of Shanti and Wimala, also children living in other families, came closer to that of their counterparts in Colombo.

Shanti and Wimala.

Shanti (aged 9) lived near Podigama, a village about 45 minutes drive away from Mainstream Town. She came from a family of Tamil estate workers and lived in a line house on an estate with her parents. Up until recently Shanti had gone to school, but when she stopped going her mother said that she had been placed with an aunt, who worked in a house in the town. Another aunt, whom I met, also worked in a house, in Colombo. After a week at the house in Mainstream Town, Shanti ran away and was found “stranded” by the police at the central bus station. Proceedings were brought and she was returned to her parents care under 10,000 rupee bond (approximately one hundred pounds sterling).

Wimala, at 15, had also been a domestic servant at some time in the past, but this was not the reason that her case came to court. She had runaway from her aunt’s house because one of her uncles was “troubling” her, and like Shanti, she was picked up by the police on the street. Once again proceedings were brought, and this time, when her aunt refused to have her back, Wimala was put in a certified school under a three year court order.

Lastly, I obtained information about Gamini’s situation from maintenance

proceedings in which his family were involved. This, again, was not directly a court case about child placement, but it did raise some relevant points about the practice.

Gamini.

Gamini was another “adopted” child, like Anoma. His adoptive aunt told me that he had been adopted from hospital when he was 10 days old. He was now 7. The family had wanted to adopt him because they already had two girls and they wanted a boy to carry the family name. To confirm the placement, the aunt said, the family had “made an entry” at the police station. The adoptive father was also named as Gamini’s father on his birth certificate.

Unfortunately, family relationships began to disintegrate. Gamini’s aunt claimed that his father had wanted to sell the family home, built on the proceeds of his wife’s employment in the Middle East, and described violent incidents between the adults. The parents were now separated, the father living with another woman, and the mother had a job in Kuwait. Gamini lived with his elder sisters, (aged 17 and 8), under the nominal supervision of another maternal aunt.

The separation had led to court proceedings, with the mother claiming maintenance from her husband to support the children. According to

the court record, the magistrate's court made an order in July 1995 that the father pay 350 rupees per month (approximately six pounds sterling) for each of the girls. By mid 1996 the father was in arrears with these payments, and furthermore no support was forthcoming in respect of Gamini. The mother brought the case back to court seeking both arrears and maintenance for Gamini. Gamini's mother was represented in court by the mother's sister and a lawyer from the Kandy legal aid centre and a decision was awaited.

It is important to note that two of these cases did *not* come to court. Instead the needs of Anoma and Radhika were addressed through the probation department. Equally significantly neither Gamini's case, nor that of Wimala's, received court of attention because of their placement in non biological families. Shanti's treatment, in contrast, was much closer to that received by children like Dharmapala in the Specialist Court.

The fact that cases like those of Anoma and Radhika did not come to court raises a couple of points about the way informal placements were construed by the child care authorities, which I intend to explore in this chapter. Firstly, the absence of proceedings in these situations reduces the role that the court process, as distinct from the welfare and correctional branches of the child care system, has in responding to, and constructing children. Secondly, this approach to informal placements would seem to be associated with the way that children are constructed in Mainstream Town, and it is with this point that I start my discussion of the data.

## **Child Domestic Service and Child Placement.**

At one level informants in Mainstream Town seemed to share the idea of child domestic service predominant in the Colombo model. When asked whether she had come across instances of children being placed with other families to do some domestic chores in return for board and lodging, Mrs Pieris (the magistrate) said

“...under various guises children are being taken on the pretext of having a sort of a companion to their own children, as a playmate or some such thing, but actually what happens is that they are being used as domestic servants. That happens although it is not legally permitted, there are instances where it happens.”

She then went on

I remember ... a case, where a very small child of 9 years old...a certain gentleman had taken removed this girl as a domest..., as a companion for his own child. They were both of the same age, and the neighbours had ... suspected that this girl had been harassed on certain occasions and they had reported some burn marks on her hands. So an anonymous petition was sent. I got the police to inquire into it and ... found that this child was, you know, used as a domestic servant. For her lapses she had been burnt by the whole of that house and beaten



up, like that. So I got her removed and she was sent to some, I don't remember where exactly I sent, for an appropriate institution I sent, under probation care.”

This anecdote presents a stereotypical example of the abusive situation faced by children in other families; an example which would be instantly recognisable to Mrs Usavia. When *she* was asked about a “typical case” Mrs Usavia referred to Khadija’s experiences. Khadija too had been burnt, by members of the extended family. This was one of the first cases brought to (a magistrate’s) court under the amendments to the Penal Code passed in 1995, which revived the offence of child cruelty (Penal Code, amended section 308). As such it was hardly a typical case of child domestic service, although it was high profile, and one that represents the concerns of policy makers and Mrs Usavia about child service, concerns apparently shared by Mrs Pieris.

The probation officers in the Mainstream Town office also expressed concerns about the practice of children working as servants. I asked Mr Weerakoon how he would describe a child in an informal placements who was well treated. He replied, correctly, that families could not keep children under 12. Over 12 “well treated” meant “ good education, free time, limited work” and putting money in a saving's account for the child. But, he said, people don’t treat children well. They don’t send them to school, they don’t think of the child’s welfare and they take as much work as possible from the child. Mrs Wickremasinghe implied much the same thing when she said that many children did not want to work as servants and refused to disclose their

parents' names, for fear that if they were returned home their parents would find another house for them to work in.

The position that these probation officers take on the causes of child service seems to reflect ideas current in the Colombo media and policy circles. Mr Weerakoon and Mr Obeysekere both presented child service as a developing phenomenon. Mr Weerakoon said that families had previously given up children because of poverty or separation, but now, he said, the reasons were more "modernised". Mr Obeysekere agreed. When interviewed, he said that there were more cases now, because families separate more easily. Like the press and Colombo academics, he blamed the problem on the increasing numbers of women going to the Middle East for work, leaving behind children who are harassed or who commit suicide. Mr Obeysekere's solution to these problems was to strengthen the probation department, which he saw as having been allowed to decline over the years, to increase probation officers' powers, and to implement the custodianship provisions of the Adoption Ordinance.

Mr Weerakoon and Mr Obeysekere also raised concerns about the particular difficulties that girls experienced as domestic servants. Both felt that they were vulnerable to sexual assault and rape; and Mr Obeysekere attributed the social problems of prostitution, abortion and sexually transmitted diseases to the practice of girls being employed as servants. A similar attribution was made by the previous central government Probation Commissioner in a press statement (12.5.1995) and the same concerns were raised during Parliamentary debates, in 1995, on amending the

Penal Code to strengthen provisions on sexual offences (Sri Lankan Government Hansard 1995a&b).

In these circumstances it is hardly surprising that cases like Shanti's are dealt with as they are. Although described as "stranded" in probation documentation (that is separated from her family), Shanti was designated a domestic servant in the court report and treated accordingly. She was very quickly sent back to the care of her parents under a large bond to secure their future cooperation. This response is much the same as would be expected from the child care authorities in Colombo. What is surprising, though, is that there are cases like those of Anoma and Radhika, children who were maintained in informal placements following complaints that they were treated as servants. What this suggests is that despite the many similarities in outlook, there are differences in perspective between Colombo and Mainstream authorities, differences which contribute to variations in practice in Mainstream Town.

An intimation of the difference in perspective is given by the number of cases of child service encountered. Both Mr Weerakoon and Mr Obeysekere suggested that there were now more cases of domestic service than there had been in the past. When asked how many child servant cases he had dealt with recently, Mr Obeysekere (after some prompting), identified 18 cases categorised as child servants in the year 1994 to 1995. A further 15 cases seemed to have been dealt with in 1996 by the time of the research (in November 1996). The total number of probation cases during this period (1994-1996) was 427. Child servant cases seemed to form a very small proportion of the

probation case load.

Several informants reiterated that there were very few legal cases in Mainstream Town involving child servants, although it was agreed that there were more cases elsewhere. Mr Jayawardena, (the additional magistrate) for instance, said that he had dealt with many such cases in Avissawella, a town on the edge of the central highlands, when he was a magistrate there. In contrast Mrs Pieris said that no child servant cases had come before her since she had been appointed to the Mainstream Town court. This was corroborated by two lawyers from the Mainstream legal aid centre that I spoke to, who said that they had dealt with no cases similar to Wimala's. Similarly, Mr Hayley, another lawyer whom I met in the magistrate's court, said that the law was obsolete and that he too had dealt with no such cases. Along the same lines, the officers at the police desk in town were unable at first to point to any cases at all. When asked if they had dealt with situations in which children were brought up in other families they said no. "Any cases of child domestic service?" "No." "Do you hear of any cases by petition?" "No....[there was] a petition about a child, well cared for, [they] wanted to send child to school, to send to good [school]". It finally emerged that the desk had had three petitions since February 1996, one of which was about Anoma. The third had yet to be investigated. The consensus seemed to be deafening: child domestic service was a problem, but not in Mainstream Town.

The apparent lack of cases could be attributed to a difference in definition. In the Specialist Court any situation in which a child was received into another family, for

whatever reason, was categorised as a ‘child domestic servant’ case. There was a similar practice of case categorisation in the Mainstream Court. For instance the probation department provided me with a list of 42 probation cases heard in court between January and June 1996, set out according to type of case, the main categories being “stealing”, “guardianship and protection” and children found “stranded” by the authorities. There was no separate category for cases involving child servants. Instead cases involving children such as Shanti seem to have been described, not as children who needed guardianship and protection, but as “stranded” children.

In discussing the probation list, Mr Weerakoon said that children who needed guardianship and protection were orphans, or those whose parents were unable to care for them, or who were abused. On the other hand the term “stranded” was applied to children who had run away from home, either the parental home or from a receiving family. Both sets of children were brought to court under section 34 CYPO, as children in need of care or protection, but in the case of “stranded” children this requirement seemed to stem not from their status in the family that they had left, but rather by their separation from that family. The question of how the child was treated seems less important than the fact that the child was now outside the family. Rather than children being redefined as child servants and section 34 being interpreted so as to incorporate child servants, child servants were redefined as stranded children and then section 34 was applied. However such a redefinition was only relevant where children were found outside the receiving family, and could not be applied to child servants found *in situ*, suggesting that such children were not included in the area of

court intervention. This approach may also explain why the magistrate, Mrs Pieris, said that she had had no child servant cases, they were simply not recognised as such in the Mainstream Court process.

Another reason why the magistrate may have said that she did not have child servant cases is that many, however categorised, do not reach the court room. Mrs Wickremasinghe (probation officer) said that there were a lot of cases which involved child servants in her experience, but that the probation department did not take them to court, instead they were settled at the probation office. She gave an example of a child who had been brought from the northern war zone, by an army family, and was being made to work in the house and garden. There were several reasons, she said, why the department chose not to take this type of case to court. In the first place they would need the assistance of the police, which they might not get, to produce the child to court, since probation officers could not remand children. Then, if proceedings were begun, the child would have to undergo a long court process, and would be sent, on an interim basis at least, to a children's home. In the example she gave me, she said that the child had been able to stay with the receiving family until the parents were found; the receiving family would not, she felt, harm the child in these circumstances because they knew that they were being monitored by the department. It was then possible to settle the case by bringing the families together at the probation office, "talking nicely" to the receiving family, and getting them to deposit money in the child's saving account. The child could then go home.

Perhaps the most significant reason for the comparative lack of cases in the Mainstream Town area, is the fact that children in informal placements were not invariably perceived to be child domestic servants. There seemed to be a fairly widespread view among informants that such children were generally well cared for. For instance one of the legal aid lawyers said that it was very rare for people to ill treat the children in their care. That sort of thing happened in the urban environment, in Colombo particularly, but not in the more rural context of Mainstream Town. In the rural culture, he said, people loved children, even other people's, they had not departed far from the traditional culture. In less idealistic terms Mrs Pieris (the magistrate) suggested that families were not brought to the courts because there was no case against them, the child was living happily with them, and their welfare was served by remaining where they were. Even Mr Obeysekere (probation officer) agreed that people could still be kind to children, and this was a perception which is exemplified in the approach taken towards the placements of Radhika and Anoma.

### **Radhika and Anoma.**

Radhika's case was first mentioned to me by an officer from the labour department. He said that they had received a petition and had investigated the case. The conclusion had been that employment could not be proved. She was not employed, "therefore the labour department was not interested". This conclusion seemed in part to have been based on the assumption that Radhika was going to school, although both the probation department and the receiving family, the Pereras, agreed that Radhika had

not been educated. In any event the labour department passed the case on to Mr Weerakoon at probation.

The initial response of probation seems to have been that Radhika should be removed. This was not surprising since Radhika was only 9, and she was not being sent to school. It will be remembered that Mr Weerakoon's definition of a well treated child, was one that was being educated. What was surprising was that Radhika was allowed to stay. The reasons given by Mr Weerakoon were that she was she had no family, and that it was good that she could stay with the Pereras, "and the main thing is that the child wanted to be with them". Acting in response to *Radhika's* wishes, the probation department arranged for her to get a birth certificate so that she could go to the village school, and ensured that the Pereras made regular deposits into a savings account, under the terms of what they called a probation supervision order.

Both Mr Weerakoon and Mr Obeysekere were adamant that Radhika was not a servant. Servants, in Mr Obeysekere's view, suffered obvious discrimination. Children taken in as servants had their names changed, had to sit on the floor, had to eat after the family had eaten, and did not have to a bed to sleep in. This was not apparently what happened to Radhika (or Anoma), they were also not abused, therefore they were not servants. The fact that Radhika was sent to the village school while the Perera girls went to the prestigious local convent was dismissed as irrelevant. Radhika was lucky to be there.



The response of the police desk to Anoma's case was very similar. The investigating officer found that the relationship between Anoma and the Bandaras was good, and this was confirmed by the neighbours. In addition, attempts had been made (although unsuccessful) to send Anoma to the same school that the Perera children attended. As a consequence the police concluded that Anoma was not a servant and simply referred the case to probation. Indeed, Anoma's case was mentioned to me by the desk as an example of a child who was not a domestic servant, but as one who had been the subject of a "false petition" sent by an "angry person".

The different perception of informal placements seems to have shaped probation and police practice towards Anoma and Radhika. It has already been noted that their cases were not brought to court, and apparently the probation department in Mainstream Town were prepared to allow children to remain in the community, not simply with their families, but also with other individuals who were considered appropriate. This arrangement was achieved not through a "fit persons" order under the CYPO- such an order would require court sanction- but by means of what was described as a "probation supervision order" made by the Provincial Commissioner. Mr Obeysekere commented that this order was not strictly legal, but it was commonsense. If this type of arrangement occurred in Colombo, it was certainly not mentioned by any of the probation officers that I spoke to. It seems that the recognition that not all child placement involved domestic service, allowed the child care authorities in Mainstream Town to be flexible in their approach to these placements. At the same time as Mrs Wickremasinghe suggested, the probation authorities were equally flexible in their

willingness to circumvent the court process when dealing with children who they felt had to be removed, involving the families in a probation based set of negotiations, rather than legal proceedings.

### **Child Placement and Receiving Families.**

The Pereras seemed quite open about their relationship with Radhika. Like several other army families (I also came across one such family in Colombo) they had taken over the care of a Tamil child who was separated from, or had lost their parents, during the continuing conflict. The Pereras had cared for Radhika, feeding her up (“she looked anaemic when she came”) and Mrs Perera expressed affection for her; affection which Radhika seemed to return. They said that they saw Radhika’s future as trying to get her to study, and meanwhile they would make monthly deposits for her. She would stay with them until she got married. On the other hand, the Pereras had not thought of adopting Radhika, and had been reluctant to keep her after the petition was sent, relenting in the face of Radhika’s insistence, and presumably helped by probation department support.

As with Adele in the case of Niranjana, or Estelle and Nelunika, there was no suggestion that Radhika was quite a child of the family, but equally she does not seem to have been there solely to do domestic work. In her case ideas of charity and patronage seem to have worked to support a form of foster placement, rather than exploitation.

The Pereras had not attempted to regularise Radhika's relationship with them by reference to the state legal system. The Bandaras though, had altered Anoma's birth certificate so that Mr Bandara was registered as her birth father. The Samarasinghes, who had taken in Gamini (see case synopsis) had done the same thing. They had also taken the precaution of making an entry with the local police station, confirming that Gamini was living with them. Both of these actions were what might be described as sub-legal strategies. They involved an adaption of legal processes- birth registration and the requirement (often under security regulations) to notify the police of the names of household members- in an attempt to create a recognisably legal effect, a legal relationship between the child and the family.

In contrast to the Pereras, the Bandaras and the Samarasinghes seemed to want to present Gamini and Anoma as children of the family. At face value there was nothing to suggest that they were not blood related. These situations seemed close to Mrs Hattai's relationship with Ralph, rather than Mary, in the Colombo data.

The practice of making entries at police stations was described as "make- belief" as far back as 1935 by the authors of Sessional Paper No II (Sri Lankan Government 1935a). It was hoped that the introduction of an Adoption Ordinance would stamp out this practice (and presumably also the forgery of birth certificates). The police desk in Mainstream Town denied that they allowed people to register children in this way, and said that families had to adopt children legally. On the other hand, the lawyers at the legal aid centre had directed me to the police station to ask this question, because

they felt that the practice was continuing, as the Bandaras' experience would suggest.

As I mentioned in Chapter 3, there seem to have been a rise in local adoption applications, following amendments to the Adoption Ordinance which imposed controls over foreign adoption, in response to concerns about baby trafficking (Act No 15 of 1992). According to Mr Obeysekere there had so far been 78 adoption cases in 1996. The Bandaras and the Samarasinghes though had chosen to avoid adoption proceedings. The motive may have been financial, court proceedings could be costly, but it is more likely that the families wanted to keep their reception of the children secret.

The local District Court, which has jurisdiction in adoption cases, was adjacent to the Mainstream Court and one of the judges, Mrs Cooray, discussed the adoptions that she dealt with. She said that couples preferred to adopt babies, and one reason for this was the matter of secrecy which she said was important in local statutory adoptions. She said that families "try as far as possible [to be] real parents. [There is] a lot of covering up. All adoptive parents fear that [the] child will leave them... when the child comes to know [that adopted] will search for their true parents. In other words, in Mrs Cooray's analysis, the secrecy arises from insecurity about relationship with the child. Equally though, the social role which she attributed to adoption would explain the need for concealment. She suggested that the family unit could "split" if there is no child. "In our society the mother in law may condemn [the daughter in law if no child]. [The] trend is to condemn the woman. To avoid problems and if couple willing

to adopt child [will do so?]. Not only protection of child [also] ... family unit [kept] together. Main thing they keep the family unit together.” Adoption in these terms is seen as a sort of social glue, maintaining relationships, and concealing the infertility of one or both of the partners.

This secrecy though may be challenged by the court process. Although cases are heard in camera, guardians ad litem may be appointed to investigate the background to the application, which could include talking to family and friends. An earlier informal adoption would be particularly hard to conceal when a child is over 10, since at that age his or her consent to the adoption is required (section 3 (5) Adoption Ordinance). This was a problem encountered by families who had failed to manage the birth registration process as successfully as the Samarasinghes. As both Mrs Cooray and Mr Obeysekere commented, families can find babies (and take them in on an informal basis), but they later find that they need official documentation, especially the birth certificate. As a result they were forced to legitimate the child’s placement with them, through the statutory adoption process, a requirement which may in part explain the number of formal adoptions in the Mainstream Court area.

Secrecy seems to have been important in Gamini Samarasinghe’s case. Mrs Samarasinghe’s sister said that the family had moved house because of the fear that Gamini, who did not know that he was adopted, would be told by other people. When I visited the family home Gamini was sent out of the room so that he would not hear the discussion. Indeed Gamini’s situation may well not have come to light at all had

it not been for the dispute between the Samarasinghes. The initial maintenance application did not refer to his status, but it was disclosed when Mr Samarasinghe denied paternity and revealed the child's background. Having been disclosed, the lack of a legal relationship became an issue in court: since Mr Samarasinghe was not Gamini's legal father, should he be required to take financial responsibility for him?

Lawyers representing Mrs Samarasinghe argued that he should. They said that he had applied for Gamini's birth certificate as the child's biological father and had taken over responsibility for his upbringing. It did not matter, they said, that he was not legally adopted, "legal adoption is not the main issue. He cannot say that [he] is not responsible now...can't get out [of it] by saying now not legal. Fact is that child has to be maintained".

It was unlikely that this argument would find favour with the court. Mrs Pieris, the magistrate, commented to me that there was no reason why Mr Samarasinghe should be made to pay for a child that had not been formally adopted. In this she would seem to be legally correct. There seemed to be no question that Gamini was the biological child of either parent, so that the presumption of legitimacy would not operate, and proof of paternity would not be available. Assuming that Mr Samarasinghe did successfully deny paternity, there is no provision under the Maintenance Ordinance that a father should support a "child of the family" as distinct from his biological child.

The court's approach was predictable, and one likely to be shared by the Specialist Court, if the law were strictly applied. As seen in the last chapter, the existence of a legal relationship was deemed a necessity in Specialist Court practice if a receiving family was to be allowed to keep a non biological child. Interestingly the police and probation departments in Mainstream Town seemed to take a different approach to child placement and legal relationships. Neither Anoma nor Radhika were legally adopted or fostered but they were permitted to remain with the receiving family. The police OIC said categorically that she would not allow families to register children, they had to be adopted. But although she was aware that Anoma's birth certificate had been forged, she made no suggestion that the child should be either removed or adopted. The probation department was equally pragmatic. Radhika was permitted to stay with the Pereras on the basis of her perceived interests; she had a family environment, and she wanted to be there. Mr Weerakoon was more doubtful over Anoma's situation, but Mr Obeysekere had no concerns. He agreed that the Bandaras had acted illegally, but Anoma was still their child.

It would appear that there was a much greater level of toleration, in the probation department at least, for informal relationships which had not been legally validated. There was no suggestion of any form of intervention in Gamini's case, and Anoma and Radhika stayed with their receiving families without being adopted. This is again in contrast to the situation in the Specialist Court where the lack of legal relationship was crucial in condemning informal placements, and redefining them as child exploitation. Instead, in Mainstream Town, the probation department was prepared

to legitimate placements through monitoring and supervision, maintaining these arrangements in a legal grey area, neither legally recognised nor legally excluded.

At the same time the efforts made by the Samarasinghes and the Bandaras to create a “legal” relationship between them and the children that they had taken in, suggests a recognition of the importance of state legal demands. Their response fell short of the requirements of the Colombo model (which demands adoption or custodianship). It also suggests an attempt to exclude state intervention in their family relations.

## **Conclusion.**

What I found in Mainstream Town was a difference in responses to child placement. There were comparatively few child service cases and children were not always removed from informal placements. This difference is not explicable by a difference in the structure of the child care system, it is substantially the same. Nor is it simply that Colombo child care officials are more assiduous in their policing of informal placements, although this may be the case. Nor can it be said that there is a rejection of the international model of child domestic service. The officials that I encountered condemned the practice. What was different, as I have argued, was the way that child placement was constructed, as a potentially positive practice.

I suggested at the beginning of this chapter that the other side of the story, the experience of children and families, was more complex than acknowledged in the



Colombo model. Ideas of a patron client relationship were used by families to justify placements, although it was not clear whether this was simply a conventional response. My small sample in Mainstream Town suggests that references to patronage might be more than conventional, since values associated with ideas of patronage seemed to inform the difference in construction of child placement. These ideas are in competition, if not conflict, with the Colombo model.

Both the official response to child placement in Mainstream Town, and the strategy used by the Bandaras and Samarasinghes to regularise their relationship with the children they had “adopted”, could be seen in terms of resistance, as, to use a Foucauldian short hand, sites of struggle. Merry (1995) discusses three forms of resistance through law: resistance against law; within law; and the redefinition of law. Resistance within law involves the use of law as a place to contest relations of power, with the benefit that it results in the legitimation by law of the outcome of the contest (and the cost that this appeal to law perpetuates a legal hegemony). Redefinition of the law again involves a recognition of the law, but also demands that the law recognises other sources of law as law. The last form of resistance, resistance to law, is perhaps what comes closest to the situation in Mainstream Town.

In connection with the idea of resistance to law, Merry describes a Filipino immigrant in Hawaii, who admitted sexually assaulting an underage girl. He would have been given probation, except that he refused to have his self inflicted stigmata treated. As a result he was given a long prison term. For me, the point of this example is the non

engagement of the man with the legal process, despite the consequences. It seems to me that there is also a form of detachment in Mainstream Town. The law is not directly challenged, it is avoided, through dealing with child placement in probation offices, and by forging birth certificates to preclude adoption proceedings. It could be argued that these actions amounted to, if not a resistance to rights, then a resistance to ideas of childhood associated with rights.

In contrast, in the Specialist Court, I found a particular concern to use law to combat what was perceived to be the abusive practice of child placement. A concern which involved, if not a distortion of international discourse, then an exaggeration of it. This exaggeration was expressed in the expansion of the existing jurisdiction of the court, through the redefinition of parental responsibility, and of children on the street, and particularly the redefinition of child workers and placed children as child servants.

The approach in the Specialist Court marks a reproduction of a powerful, exclusive, child rights discourse, which I would accept supports the removal of children from abusive situations, something which cannot but be good. My concern remains, though, that it fails to help children caught in between, between adoption and exploitation, and between competing ideas of childhood.

## **Conclusion.**

### **Different Priorities.**

I began this thesis by asking the question, with particular reference to child servants in Sri Lanka, if child rights are the best we have, are they good enough? I then broke this originating question down into several subsidiary ones, including the way law and rights construct children, the relationship between law and power, and the effect of applying rights to children, which, together with the whole question of “globalisation”, have provided themes for my analysis. I will now try to pull the disparate threads of this analysis back together, in order to finalise my answer to the “good enough?” question, and I will start where I ended the last chapter, with Sri Lanka.

One of the key points in my Sri Lankan research (set out in Chapters 4, 5 and 6) is the identification of a significant conflict in approach to child placement, embodied in the contrasting responses of the Mainstream and Specialist Juvenile Courts. It is a conflict that is also apparent in the difference in attitudes (if not analysis) between activists and officials in Colombo and Mainstream Town.

Among activists and officials in Colombo I found that child workers, child servants and foster children tend to be seen as subsumed under the same rubric: victims. As children outside the “natural” family environment they are understood to be vulnerable to actual (emotional) and potential (physical and sexual) abuse. As workers

(and they are all defined as workers) they suffer from the loss of educational opportunities. This is, as I have argued, a construct, (I labelled it the Colombo model of child service) and it reflects the “global” ideas of childhood enshrined in the CRC: children should have the right to be educated, and to be protected from exploitation.

The strategies proposed and adopted by the Sri Lankan government to address the problem of child service, seem to restate this internationally influenced, Colombo model. Child work under 14 (Plan of Action) or 15 (Technical Committee recommendations) is to be banned. It is intended to treat child “victims of labour” as protected children rather than delinquents, and to mobilise public opinion against the practice. At the same time, reinforcing ideas of lost opportunities, compulsory education regulations will be enacted. This is accompanied by a new found resolve to enforce existing legislation, and a recommendation that custodianship provisions under the 1941 Adoption of Children Ordinance be implemented. These latter are not intended, and never were intended, to accommodate different forms of child placement, rather they were drafted as an attempt to control quasi adoption. As I suggested in Chapter 4, the combined effect of all these proposals will be to delegitimize unregistered placements and situations where children may work, or not attend school.

The influence of metropolitan ideas in Sri Lankan family policy is not new (a situation which Robertson might attribute to an early phase of globalisation (1992: 57), although it could also be understood as evidence of globalisation being more of the same), but there has been a shift in the construction of child placement. In a

genealogically influenced analysis (see Chapter 3), I looked at how an original (colonial) focus on property rights led to the creation of Kandyan adoption, and the beginning of an undermining of other forms of child placement. There followed a period in limbo, with child placement, described as quasi adoption, being treated as more or less respectable, but with attempts being made to regulate most placements, especially those involving child domestic service. Current strategies will confirm a model of child placement which is either abusive (that is involving domestic work) or custodial (that is mimicking the biological relationship), and exclude alternative reasons for placement. In particular ideas of patronage are displaced by a (state) legally recognised tie, as a way of regularising relationships.

My more limited information about Mainstream Town, (see Chapter 6), suggests that there has not been the same shift in the construction of child placement as in Colombo. In the Specialist Court, for instance, the law appeared to be applied so as to facilitate proceedings where children had been placed outside the family. In contrast, in Mainstream Town, the legislation seemed to be interpreted so as to produce a contrary result. The difference can be demonstrated by reference to a couple of statistics. In the Mainstream Court there were 42 cases involving children in 5 months in 1996, none of which were domestic service cases. In the Specialist Court, however, in only 5 weeks there were at least 28 such cases. Reinforcing the impression of a different approach, the problems of child servants only formed a small part of the probation case load in Mainstream Town (there seemed to have been only 33 such cases between 1994 and November 1996), while officers at the local police desk initially said that they had never dealt with a complaint about domestic service.

The disparity in case numbers between Mainstream Town and Colombo could be simply explained if child placement was uncommon in the Mainstream Town area. However, my informants were familiar with child placement. Rather the difference seems to lie in the way that placement is perceived. Informal placements continue to be seen as beneficial, even though this perception runs side by side with an acceptance that child domestic service is undoubtedly abusive, it is just not a problem in Mainstream Town.

The conflict in approach between Mainstream Town and the Specialist Court is significant in that it has important practical consequences for children. Children such as Nelunika, Niranjana and Leela, might have been allowed to stay with their receiving families under a “common sense” probation order, if they lived in Mainstream Town. On the other hand, Soma and Mahinda might have had to suffer in an abusive placement for longer than they did without the intervention of the Colombo authorities. Neither approach uniformly protects children’s interests.

The different ideas about child placement expressed in Mainstream Town and Colombo are also significant with regard to the question of globalisation, and the interaction between “local” and “global” ideas. To reiterate: I asked in my introductory chapter who was correct, Appadurai or Robertson, in predicting how international child labour standards would be likely to operate in Sri Lanka. Appadurai argues that global ideas tend to be reformulated to meet the demands of the Sri Lankan context, while Robertson would predict some form of relativisation between Sri

Lankan and global ideas. Both, though, argue for a multiplicity of perspectives, more or less, and try to distance themselves from the idea of a uni-dimensional western encroachment, although Robertson is the least successful in this. At the same time however, underlying these accounts to an extent unacknowledged, is the idea of a dominating western discourse in the shape of Appadurai's master narratives and Robertson's reference points. My analysis in Sri Lanka indicates that this idea of a continuing, underlying, domination is reinforced. The "global" model of child placement was more pervasive than perhaps either Robertson or Appadurai would have predicted. It was also more pervasive than I anticipated. I expected a greater distortion, an Appadurain diffusion of rights ideas. Instead while I found that local concerns, including fears of social fragmentation, and "Protestant Buddhist" values, may have helped to generate the debate about family values, of which child placement is a part, I also found that international discourse set the terms of that debate in both Colombo *and* Mainstream Town, for instance in the conflation of child placement with child domestic service as an abusive practice. In effect, the situation resembled more closely Santos's idea of cultural cannibalism, in which a "hegemonic local culture cannibalizes and digests other subordinated cultures" (1995: 342), rather than Appadurai's "mutual effort of sameness and difference to cannibalize one another".

The strength of the international discourse in Sri Lanka may be unusual. I am not in a position to make any detailed comparative observations, although I did suggest in Chapter 4 that while the legislative response to child labour in India and Pakistan, as Sri Lanka's neighbours, may not be the same, (a regulative approach has been adopted in both cases), it operates along the same continuum of ideas of children and work. It

was the strength of international discourse in setting the terms of debate in Colombo that led me to look more closely at the situation elsewhere in Sri Lanka, in Mainstream Town. The continuing significance of the discourse in constructions of child placement in Mainstream Town in turn led me back to a concern with the way rights talk about children.

The constructions of childhood current in international discourse rely on the basic idea of difference, the difference between children and adults. Burman in her analysis recognises that these norms underpin the rights discourse. However she does not sufficiently address the implications of the argument that child rights do not simply *enforce* these constructions, they *reinforce* them. This is a point that bears repetition, since it is not one that receives sufficient recognition among rights proponents. In the legal discourse, no less than in the “psy” and medical discourses, children are defined as different from adults. Issues such as development, emotional security and cognitive skills are translated into questions of rationality, in that the extent to which children are permitted to participate in the legal process, as well as the nature of their capacity and of their rights, depends on an assessment of their rationality. Legal milestones such as criminal capacity, the age of consent, the age of entry to work, represent and recreate wider normative values. In sum, rights construct children.

Moreover, child rights are tied to a particular idea of society. For instance, as I argued in Chapter 2, it is an idea that distinguishes between public and private spheres of activity. Children are associated with the private sphere, and their rights as well as needs justified by this association. Equally, child rights serve to reinforce the notion



of a public/ private divide, by providing a baseline for the extent of “external” intervention into the family.

These characteristics of child rights gain significance when reaching across ontologies to the situation in Sri Lanka. Policy makers and implementers in Sri Lanka seem to have embraced the vision of child rights and the social organisation that they represent, and perhaps to have done so to a greater extent than their counter parts in India and Pakistan. But it is a prescriptive vision, currently embodied by the CRC, which the best interests principle (article 3.1) does little to ameliorate. It is, I would suggest, extremely unlikely that there is scope for the best interests of the child, however “indeterminate” (Parker 1994; Burman 1996), to be interpreted so as to contradict the substantive rights established by the CRC. There is no flexibility in the demands of the Convention that children should be educated “for life in a free society”, and that they should be brought up in a family environment sanctioned by some form of legally recognised tie. It is this vision that reduces the uncomfortable difference and complexity of children’s lives in Sri Lanka, to an either or of abuse and protection.

This process of construction cannot be but an operation of power, the local constrained by internationally dominant ideas. Baxi’s response (see also Ghai: nd) is to identify the local as the “crucial locus of struggle for enunciation, implementation, and enjoyment of human rights” (1998: 151; and 1996). He opposes a local materiality to the dominance of global ideas, arguing for an attempt to write ideas in a local image. The vehicle for this process is “contemporary”, as distinct from “modern” human

rights. Contemporary human rights are characterised by a multiplicity of authorships (NGOs et cetera), while the production of “modern” human rights remains state and Eurocentric (1998: 138). There was NGO participation in Sri Lanka, in the formulation of strategies to address human rights problems, the ILO workshop in 1996 was an example. However the identification of problems, and the proposed enforcement of solutions was both statist and Euro-centric. International ideas of childhood were widely accepted, and within the rights discourse were generally unchallenged, both in Colombo and in Mainstream Town. Difference, challenge, occurred *outside* rights. This is the implication of the gap between an acceptance among informants in Mainstream Town that child domestic service was a problem, and the belief that it was not one that they faced. That is, as I suggested, the model of child servants as abused children, children whose rights were violated, was accepted, but the children encountered by informants who had been placed in other families, were not recognised as having had their rights violated. Potential resistance to international notions of childhood took place not in terms of rights, but in terms of patronage and culture.

In any event, I would argue that resistance to international ideas within rights as they stand is difficult. Rights replace “primordial identities” (Baxi 1998), a replacement which does benefit many individuals. But I would reiterate my argument made in Chapter 2 that rights replace these identities with constructs in which there is only limited room for empowerment or manoeuvre, through which to reveal “suppressed knowledge”(Fitzpatrick 1995), except as different. Rights struggles are structured by rights and that is the best and the worst that can be said of rights.

But what of the attempt to introduce flexibility into child rights in the face of a globally intensive interplay of ideas? As I mentioned at the outset, Burman argues for a via media between relativism and imperialism, in which local conventions, different models of childhood, are recognised in the implementation of the CRC. In fact, in proposing that local conventions may be trumped (if necessary) by the ethical framework of rights (Burman, Parker 1994: 27,40) she proposes only a limited form of accommodation. Similarly, An-na'im's model of a genuine normative consensus, involves only limited accommodation between different ideas of children, since he accepts that any such consensus is likely to be structured by western norms of childhood (1994: 75).

Rights are important as Freeman points out. He argues for acceptance of rights in the absence of cultural revolution, "Short of a cultural revolution beyond our wildest dreams, rights will remain important" (1992: 31). Short term acceptance of rights does seem inevitable, although I would argue for a much greater appreciation of the limits of rights that I have discussed, most particularly of their prescriptive nature which imposes a certain sort of childhood, for better or worse. To an extent this is beginning to happen, with, for example, the Worst Forms Convention, which refocuses attempts to eliminate child labour by concentrating on exploitative forms (although most types of child labour may be seen as exploitative, particularly if labour and education are juxtaposed). However, child rights remain a contemporary shibboleth, officially at least. What is needed is the imagination to develop the cultural revolution that Freeman demands. I can only supply a few ideas in that direction.

I begin with Teubner. Teubner is a long time advocate of autopoiesis. Autopoietic theory suggests that society should be viewed as composed of a multiplicity of self-referential systems. Such systems (which range from the individual, psychic system, to social structures such as the law) do not communicate with the environment but about it, constructing internal versions of the outside world. A recent article written with Paterson (1998) applies this perspective to attempts to establish an effective regulation of health and safety in the North Sea oil fields. The basic premise of the analysis is that attempts at regulation, which are necessarily external to the systems which constitute the oil industry, will get bogged down in the constructive processes within each system (1998: 457). For example, legislators, regulators and managers (each group being a self-referential system), will all construct the problem of health and safety in different ways. Legislators may see the need for detailed controls, while regulators understand that only broad principles are practical in a fast moving technology, and at the same time, managers are driven by economic imperatives. As a result, attempts to regulate the system are likely to prove ineffective and unpredictable.

What is needed, Teubner and Paterson suggest, is an analysis of how systems construct, or “recontextualize” (473) regulatory interventions. They suggest a method, employing a form of cognitive mapping, illustrated by several examples from the oil industry study. The understandings derived from this form of analysis can then be, in turn, recontextualised into regulatory systems, and used to prod the relevant system in the required direction. For instance, a goal of management is cost control, and health and safety regulation is constructed in terms of this goal. Teubner and Paterson

found that this goal had been successfully coupled with the regulators' goal of effective safety provisions, through cost saving systematic risk assessment procedures. This form of convergence, chaotic and unpredictable, they argue, is the best that can be achieved between systems.

I have some problems with autopoiesis, not least its tendency to *decontextualise*. For instance, what drives regulatory interventions? Are they simply a product of functionalism (see Rottleuthner's critique (1989: 790))? But I still find this analysis useful, because what Teubner and Paterson are in a sense talking about are incommensurable systems, systems which have no common factor. In effect, they are arguing for an acceptance of a radical and inevitable difference. Applied to the situation of child workers, their analysis provides a practical basis through which to develop an understanding of the multiplicity of constructions of childhood, as well as a way that they can accommodate to each other, through a convergence of goals. In terms of child placement and domestic service in Sri Lanka, this would involve taking into account the often contradictory goals of children, and sending and receiving families, discussed in Chapters 5 and 6 above. To be effective and empowering any overarching value system retained (for example Burman's ethical framework, see above) would have to be capable of responding to these goals. It would have, in effect, to be capable of accommodating difference, which as I have argued, is not a characteristic of rights.

An alternative position is taken by Fitzpatrick (1995). As I suggested in Chapter 1, Fitzpatrick argues that the idea of incommensurability, which has supported western

identity, needs to be disrupted by the refusal of the other to play the game of difference. He gives a concrete example in which “natives’ in Papua New Guinea, by definition different, used western legality to challenge colonial law. This can be distinguished from a recognition of radical difference such as proposed by an autopoietic analysis. Nor is it an attempt to develop a new universal discourse through which to accommodate difference. Rather, Fitzpatrick’s approach seems to involve a rejection of difference. To borrow Santos’s phrase, the implication is that law needs to be unthought (1995: 90). Such unthinking involves “thorough but not nihilistic destruction and discontinuous but not arbitrary reconstruction” (1995: 108). Santos assigns “emancipatory” human rights (see Chapter 1 above) a central role in this process, not least as the focus of global cross cultural dialogue (1995: 347). For me however, the central issue in such unthinking, in such dialogue, would be the removal of difference. In terms of rights, this would mean the removal of difference as a structuring concept, through which children are defined (by means of the discourse of child development), and rights attributed. Rights would no longer be rights as currently conceived, but there would be a basis on which to deal with the complexity of children’s lives.

# **Children in Between: Child Rights and Child Placement in Sri Lanka.**

## **Appendix 1.**

### **The Convention on the Rights of the Child 1989. Selected Articles.**

#### **Article 3.**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

## **Article 5.**

States parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised by the present Convention.

## **Article 28.**

1. States parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- a. Make primary education compulsory and available free to all;
- b. Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- c. Make higher education accessible to all on the basis of capacity by every appropriate means;
- d. Make educational and vocational information and guidance available and



accessible to all children;

e. Take measures to encourage regular attendance at schools and the reduction of drop- out rates.

2. States parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

## **Article 29.**

1. States parties agree that the education of the child shall be directed to:

a. The development of the child's personality, talents and mental and physical abilities to their fullest potential;

b. The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

c. The development of respect for the child's parents, his or her own cultural

identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;

- d. The preparation of the child for a responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- e. The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the state.

## **Article 32.**

1. States parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States parties shall take legislative, administrative, social and educational

measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States parties shall in particular:

- a. Provide for a minimum age or minimum ages for admissions to employment;
- b. Provide appropriate regulation of the hours and conditions of employment;
- c. Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

# **Children in Between: Child Rights and Child Placement in Sri Lanka.**

## **Appendix 2.**

### **Notes on Methodology.**

#### **Introductory Ideas: the Limits of Analysis.**

My research was suggested by the claims made on behalf of child rights, claims that appear to be unlimited. It is argued that *all* children everywhere can benefit from access to rights, in effect that there can be a universal blue print for children and childhood. The CRC is a concrete example of these claims. I found myself questioning the apparent universal applicability and relevance of the CRC, and of rights in general, and in addressing these issues it could be said that my thesis became, among other things, a thesis about limits: the limits of child rights in a non western context; the concomitant limits of western thought; even the limits of ideas of truth.

Underlying this theme of limits is a theoretical position derived from Foucault and Derrida. Foucault, for instance, expresses a fundamental idea of limit in his statement that “The death of God leads to an experience in which nothing may again announce the exteriority of being” (Preface to *Transgression* cited in Boyne 1990: 81). What he means is that there is no transcendent realm, inhabited either by a transcendent being,

or even by a transcendent entity such as the soul. Instead, he argues, that as post Enlightenment individuals we are exposed both to limit (there is nothing beyond us) and to our limitlessness (we are all there is).

The lack of transcendence is also central to Derrida's critique of presence, which I mentioned (if not by name) in my introductory chapter. In summary, Derrida suggests that western philosophy rehearses an idea of presence, that is, an originary point at which the truth is expressed. The project of philosophy has been to reveal that point of origin, to discover *the* (transcendent) truth. So, for example, Husserl attempted to get beyond language, to the moment before an idea is articulated. Derrida argues that there is no such moment, or, if there is, it cannot be conceptualised. We cannot get beyond the limits of our thought.

Rights, however, rely on a notion of transcendence. Transcendence is apparent not simply in the moral arguments that are often used to justify rights, it also there in the idea of a universal childhood which can be secured through rights. That is, rights reflect the transcendent truth about children. It is this apparent lack of limit that I wanted to look at in my analysis.

The idea of a transcendent truth has the effect of reducing complexity. Most particularly it reduces complexity in the face of the multiplicity of social interactions, which I address under the heading of globalisation. In my analysis I wanted to reintroduce the idea of indeterminacy, of a multiplicity of truths, and the consequent

(potential) limit of one particular truth about childhood, provided by rights.

The idea of limits though poses a problem for my analysis, if, following Derrida and Foucault, I accept that we cannot get beyond the limits of our thought. I am constrained by reason, and I can only address the situation in Sri Lanka from within a rational perspective. This is a problem. Sri Lanka, and other “exotic” locations (Fitzpatrick 1992), play an important role in defining the west. So for Donnelly (see my introductory chapter) non western countries are presented as being gripped by tradition, maintaining the interests of the community at the expense of the individual. In contrast, western human rights protect the individual in the face of social changes produced by modernisation. “Third World” countries are on the same (generally progressive) historical trajectory, only “two or three centuries” behind England and France, and therefore need the same concept of rights. The juxtaposition of tradition and modern, progress and stasis, is almost too familiar to point out, but it is one that serves to secure a general western identity. Equally, it helps to define the identity of the legal subject, as a self constituted individual who is not traditional, tribal or irrational, and who controls whatever traditional, tribal or irrational impulses he may feel (Fitzpatrick 1992: Chapter 4). In these terms the legal subject is not, and cannot be, a Sri Lankan child. The constraints of reason, and the tendency to define “exotic” locations and people as different, have been central issues in my analysis of child rights. It would have been ironic if they did not also play a central role in my research design, which I will now go on to discuss.

## Asking Questions.

Foucault uses the idea of transgression as a way of addressing the limits of western thought. My aim was simply to explore some of the limits of child rights. My inquiry was been compressed (as required) into a specific question:

“Are the universal constructs relating to child labour, contained in international law and Sri Lankan domestic policy, relevant to children in Sri Lanka. Are they empowered or defined as different with the potential for negative consequences?”

At this point a little decompression of the question would probably be helpful. Why “universal constructs”, “empowerment”, and “difference”, for instance? The shape of the question refers back to my theoretical position. The term “construct” here relates to the argument that child rights do not represent some manifestation of the essential nature of children, rather the “truth” about children is the product of forms of social interaction. As should be apparent from the previous section, the work of both Foucault and Derrida operate (through different approaches) to expose these constructions of truth.

A variety of claims are made on behalf of child rights. Hammarberg argues that child rights protect children’s interests, through recognition of their special vulnerability (1990). Freeman, on the other hand suggests, that rights empower. "Rights are important because possession of them is part of what is necessary to constitute

personality. Those who lack rights are like slaves, means to other's ends, and never their own sovereigns." (1992: 31). Freeman's statement comes very close to Roche's position, mentioned in my introductory chapter. Roche cites Patricia Williams, "rights imply a respect...*that elevates one's status from human body to social being*" (1995: 296; emphasis added by Roche). My concern has been to consider the sort of social being/ personality (including legal personality) that has been attributed to children. I wanted to uncover the underpinning "truths", in order to explore whether it is a being or personality that does, in the end, empower children.

My choice of research of child labour in Sri Lanka was both theoretically and practically based. Picking up again on my theoretical perspective I needed an "exotic" location, both beyond and within the limits of western reason, in which to test the universal claims of rights. I was familiar with Sri Lanka and I had the contacts necessary for field research. The choice of child domestic service followed on from the choice of location. As I argued in Chapter 4, child labour, specifically child domestic service, is frequently referred to as one of the worst forms of child abuse in the country. Equally, I was aware that the dedicated juvenile court in Colombo dealt with many child service cases making it a potential focus for my analysis. Finally, as far as I knew, very little research had been done about either the juvenile court or child service in Sri Lanka (during my field work I discovered only one empirical study which dealt with child domestic service, dating from 1983).

In choosing to do court based research I knew that I might be open to criticism that



my analysis would be limited, firstly, by the constraints of the legal process (the court is simply applying the law), and secondly, by the type of cases encountered (the court only deals with extremes). In response to the first point I rejected the implication that there is no scope for discretion in the legal process. My inquiry was directed at identifying both the legislative constructs, and the broader cultural constructs, by which they are informed and applied. With regard to the second criticism, I took the view that it was by no means certain that the court dealt with extremes, and in any event my inquiry was focussed on how children in such situations were constructed. Were they empowered by court-based intervention?

### **Answering the Question: Research Design.**

#### **A. Ethno methods.**

Having looked at my research question, I now want to consider how I set out to answer it through my Sri Lankan field work. I realised from the outset that I needed a research design that had at least three elements. Firstly it needed to accommodate the ontological idea that truth and reality are social constructs. Secondly, it needed to produce the sort of information required to answer my research question. More specifically I needed to explore how children were constructed in a Sri Lankan context, particularly the court system. Last, but not least, it had to be able to take into account my role as a western researcher in Sri Lanka. This final point requires a little elaboration.

As I mentioned above the concept of difference is important in my analysis of child rights. Fine, in “Working the Hyphens” (1994) deals with the question of difference in connection with research methods, the hyphen of her title being the relationship between the self and other. She argues that the process of othering occurs not only in contexts which social scientists research, but within social science itself (1994: 75). There is a tendency to ignore or deny the relationship between the researcher and the researched. It may be assumed that the researcher is neutral, carries no intellectual baggage, has an unmediated, unlimited, view of the “objects” of research. Fine suggests several strategies for addressing this problem, and at the heart of her argument is a demand that researchers be “self conscious” about their role (1994: 75). It may be appropriate, as a white researcher, to speak for those defined as other. A white researcher may be more likely to be heard. But one must be aware of the limits of this approach, that this is an act of translation. In my own research I have interpreted Fine’s argument as encouragement to be clear about my limits, about the barriers between me and my informants, and to use a research approach which recognises these limits and barriers.

My final research design, as far as possible, accommodated all these priorities, using what might be described as a modified form of ethnomethodology (Holstein 1994).

Ethnomethodology is a phenomenologically based research method. Rather than seeing "truth" and "reality" as discoverable absolutes, they are treated as contingent, shaped by interaction between actor and context. That is social actors interpret their

environment and develop meaning structures, which then form the basis for further interpretation. This ontological perspective complemented my theoretical approach more closely than a more semiotically based analysis, which would reduce the importance of context in the shaping of ideas of reality.

Equally, the focus of ethnomethodology is upon the subject's sense of reality and social order, a focus which tries to address as far as possible the barriers between researcher and researched often perpetuated by other, positivist, research approaches. This focus was, I felt, important for my analysis of meanings and representations of children within different discourses and cultures.

Ethnomethodology shares with Foucault's analysis an idea of shaped subjectivities. Although taking the position that meaning is generated through interaction between social actors and their context, some ethnomethodological research suggests that interpretation and the formulation of meaning has increasingly become a public process, structured by social organisations. This development of the ethnomethodological analysis permits an examination of the public process and the systems of power at work in shaping social meanings. As such I anticipated that it would be helpful in my attempt to understand the way that children are represented, the meanings applied to them, and the consequence of such meanings.

## B. Techniques.

As already indicated a major thrust of ethnomethodology is precisely to address the problem identified above, the problem of barriers. It is recognised that barriers exist which mediate the relationship between researcher and informant in any research context. More specifically, barriers of class, gender, life experience, would mediate between me and informants as much in a UK courtroom as in Sri Lanka. The way forward is to acknowledge them and work within them.

Of the ethnomethodological techniques available I felt that detailed qualitative interviews were likely to be the most relevant to my research. This approach involves a cycle of interviews with informants who provide information in response to a flexible question structure, and who may be interviewed several times in order to tease out emerging patterns of ideas and concepts. Rigour is provided by the emphasis on transparency (clarity on origin of data), reproducibility and cross checking through further interview cycles.

I proposed to use qualitative interviews to elicit from informants data about whether and how universal constructs relating to children, particularly child workers, operated in the Sri Lankan legal context. I did though anticipate that it might not be possible to achieve a cycle of interviews with the same informants, thus reducing the rigour of my approach and the cogency of my data. I therefore decided to supplement the data obtained from qualitative interviews by reference to data obtained from a) court

observation and b) secondary data analysis.

The observation of court proceedings was intended to give me access to informants and to a variety of data, including quantitative information about the number and type of cases heard, the speed of process, and the extent of participation by children, parents, and officials. In addition I hoped to gain an immediate picture from a mix of participants of their understanding of the court process by using them to translate the proceedings as and when necessary. I also had permission to read the court records, which meant that I could compare informants' accounts with the official account of the proceedings. I also intended to compare official policy statements with events in the court process. I proposed to use the data accumulated through these methods to test my understanding of concepts and experiences derived from informants in qualitative interviews, and to feed resulting modifications of my understanding into subsequent interviews.

### **Doing the Field Work: Research Implementation.**

#### **A. Pilot Study.**

As the first step in implementing my field research I carried out a six week pilot study in Sri Lanka. I used the study to confirm arrangements for the research with the relevant authorities, to bring myself up to date with legislative developments, and to ascertain what documentary sources were available for my research. The main

purpose of the study, though, was to test and refine my proposed research methods, although I already knew that at the least, I would have to be flexible in implementing my research design. As a dry run, I spent four days observing court proceedings in the Specialist Court, and carried out several structured interviews with informants.

The period of court observation highlighted some of the barriers within my research programme. I found that informants were very willing to talk, but more interested in talking about me, as a stranger. The informants who spoke English were also happy to summarise the proceedings for me, but not that many did speak English. I had hoped to be able to sit with different groups of court actors (parents, lawyers, police and probation officers) but this was not possible, in part because, as just mentioned, many did not speak English. In addition the court was in fact run by a very small number of people which reduced the pool of “official” informants. Only one lawyer conducted nearly all the cases in which there was legal representation, for example. These issues meant that the court observation work was jeopardised, and made access to more detailed information difficult. As a result I reluctantly decided to engage a full time translator, although aware that this decision created barriers in its own right, in that access to data would be further mediated by the translation process.

Equally, the pilot study reinforced concerns that the legal context could skew the research. Were informants constrained by their role, or the context, to say the right (literally) thing? I decided to address this potential problem both by using informants unconnected with the court process, as well those involved in proceedings; and by

doing a piece of comparative research in another court. Did all court officials use the same script? The answer to that question, as my field work chapters demonstrate, is an emphatic no.

#### B. The Main Programme.

This seems to be the place for a few quantitative details about my research. The main research was done in four months in the latter part of 1996. During this period I observed 25 court sessions in Colombo and Mainstream Town, and carried out 72 qualitative interviews (55 in Colombo and 17 in Mainstream Town), supplemented by well over 20 more informal conversations with informants. In addition, I read 58 case records (45 in Colombo and 13 in Mainstream Town) and I attended a 3 day ILO/Ministry of Labour workshop. In terms of secondary data, I attempted a literary review of the libraries of the University of Colombo and two other institutions, and collected data from the English language cuttings library of a human rights organisation.

The bulk of my field work was done in Colombo, and the main focus was of the research was the Specialist Court. As already mentioned, at the time of the pilot study I had hoped to attach myself to the different sets of court actors in turn, developing a group based perspective of informants' ideas. When the pilot study suggested that this would not be possible, I still intended to structure my inquiry in terms of the various groups of actors analysing their responses to the court process and the way

children were constructed within it. In practice though I found that this was not an effective approach. In contrast to the fixity that I observed during the proceedings as the procedures were followed in the daily routine, and the Law enforced, I found the informants, receiving families, parents, relatives, hard to pin down. It was not possible to speak to them during court sessions, since silence was imposed, and I had to catch people on the stairs and in the waiting room, before and after the court day. Attempts to elicit general perspectives in these circumstances were difficult, and I found it more productive to focus on particular cases and discuss informants' experiences, even when interviews took place in the more relaxed surroundings of the informant's home. As a result I got fairly detailed information on 22 cases in Colombo and 6 in Mainstream Town, with more limited detail on 25 cases in Colombo, and 3 in Mainstream Town.

When I outlined my initial research design I included with it a series of questions intended as prototypes for further development. These questions had a narrow focus, aimed mainly at "official" court actors and were severely grounded in the court process, although I also floated the idea of using a vignette to elicit qualitative information. During the pilot study my interviews were of necessity a mixture of scene setting (gauging changes in the legal scene and getting permission to speak to informants, for instance) and qualitative questions. I found that through this approach I obtained a fair amount of qualitative data. In fact the study suggested that a particular view of child domestic service was held by my informants, who were officials and activists as well as lawyers. Child domestic service was associated with



abuse. It was also apparently seen as the main reason why children were placed in other families. Child placement was given new significance and, although the extent of the practice was uncertain, priority was given to regulating or eliminating it altogether. This approach to domestic service had many similarities with the approach taken in the international discourse, and led me to wonder whether, to paraphrase Geertz (1983), there had been a convergence of views as well as of vocabularies.

I used the information from the pilot study to help refocus my interview questions. I was interested to look at ideas associated with what seemed to be a dominant “problem” model of child service. For instance, what were appropriate activities for children? I hoped to identify any alternative constructions of childhood which might support the practice of child placement, such as the possibility that a child might be well cared for by a receiving family. I was also interested to find out whether child placement was being given a new significance, by asking about past practices (this, in the event, proved to be a difficult point on which to get information).

By the start of the main research programme, I had developed a question schema, which was adapted for use with sending and receiving families, police, probation. I tended to use these sets of questions as prompts rather than interview plans to be closely adhered to. However, by allowing informants to talk about their own experiences, I generally managed to elicit the information targeted, see for example the interview notes attached to this appendix (attachments A and B) which relate to Nandani’s situation (see Chapter 5).

During the period of observation in the Specialist Court I reviewed the data as I collected it. When I shifted from a group to a case focus I became more concerned to follow up on individual cases (although this had its difficulties, see below) and also to speak to as many children as possible. Equally, given the potential effects of court based research (the court only deals in extremes), I wanted to look for comparisons, for placements which had not ended up in front of the court. The existence of such placements would, at the very least, challenge the dominant model of child service, and potentially provide information about alternative constructions of the practice. I used the time between research in the Specialist and Mainstream Courts, and after my return from Mainstream Town (approximately six weeks) to contact informants, and in the end managed to arrange 34 interviews in all.

My research in Mainstream Court came out of the feedback from my pilot study, which suggested that I needed to preempt the criticism that I was trying to extrapolate a whole legal culture from one court. How representative was the approach of Specialist Court to child placement? Did it reflect an inevitable response to demands of the legal process? Was the same approach to child placement followed in Mainstream Town? What, if any, were the differences? What were the factors influencing any difference in approach?

In Mainstream Court I intended to follow the same routine as in the Specialist Court, that is I would (helped by a translator) observe proceedings and follow up on cases. It was almost immediately apparent, though, this approach would not be possible.

There were no children's cases heard under the Children and Young Persons Ordinance (CYPO) during my period of research. In contrast, the proceedings that I observed in the adult court were on a grand scale. The court room was impressive, as was the number of cases: 192 cases were called during the first morning sitting that I was present, involving 83 appearances by lawyers or parties; the next full session that I saw, 175 cases were called, with at least 58 appearances. In the event I was able to use these proceedings to contact four informants whose cases raised the question of children's interests; for the rest I relied on the local care and correctional authorities to provide me with contacts.

The difficulty I had in following the Colombo routine in Mainstream Town, also pointed to the main finding of my research there, that there was a difference in approach to child placement. This suggested to me, as I have argued in the body of the thesis, that there seem to be alternative constructs of children and childhood operating in Sri Lanka, although given the limited nature of my research, I would not suggest that I have provided (or could provide) an exhaustive account.

I began this account of my methodology by suggesting that in some ways my thesis is a thesis about limits. I now want to conclude my outline of the field work by picking up on that idea, in setting out two different limits that I encountered during my research.

The first limit that I experienced was in my ability to speak to children placed by their

families, who were after all the people whose ideas I most wanted to hear. It is difficult to meet these children, whether placed as servants or not. Weeramunda describes how he relied on accidental encounters for his research on child labour in Sri Lanka (1983). A major factor in my court based approach was the certainty that there at least I would meet children who were described as child servants. I found, though, that it was difficult to get permission to talk to the children. In the court building they appeared to exist in a state of official purdah, unable to speak even to their parents (this was Damaya's experience, aged 5. See Chapter 5). Outside, the authorities were initially not very clear who could give me permission to talk to the children they had in their custody. When permission was given, interviews were sometimes chaperoned, and in any event took place in the surroundings of an official (institutional) environment which may have influenced them. However I did visit the family homes, in Colombo and Mainstream Town, of 12 children (one a young adult, in fact) who were not in custody and managed to interview 6 of them. Given the constraints I was pleased in the end that I managed to interview 18 children who had had experience of being placed by their families.

Another limiting factor was the difficulty of expanding on the number of informants. Outside the court research, I had, like Weeramunda, to rely on serendipity, or at least word of mouth. Within the court based research I hoped to speak to most of the participants whose cases I observed. If I managed to contact them in court I found that this was relatively straightforward. However, when this was not possible, I had planned to follow up by using addresses obtained from court records (this plan was

a little hampered by the delay in getting access to all court records). I thought it inappropriate to arrive without notice (although I did make four visits on spec in Mainstream Town). It would also have been impractical, since potential informants were dispersed across the west of Sri Lanka. I therefore sent 13 letters asking for an appointment, in Tamil or Sinhala as appropriate, with prepaid postcards on which to reply. In the event I got only one reply, which was incomplete and therefore could not be followed up. Frustrating as this was, I felt vindicated in my decision to meet most of my potential informants face to face in a relevant environment, rather than rely on address lists, newspaper adverts or chance encounters.

### **Data Analysis.**

On returning from my field work, I had the usual large amount of information to review, and re-review. Along with secondary data I had: transcripts of the main bulk of the Colombo data transcribed onto computer and held in a research directory; my Specialist Court observation notes, along with those of my translator, both manual and requiring transcription into computer files; and my Mainstream Court data in a research notebook (manually transcribed).

Influenced by Wolcott, “With me, it’s all words, all linear.” (Wolcott 1994: 31), I began my analysis by developing a chronological narrative account of my research, concentrating on the Mainstream Court study. I transcribed the manual records and wrote a 60 page, loosely structured, report setting out the data and ideas. I then began

to try to link the information generated to theoretical perspectives, particularly the idea of rights as a site of struggle (see Chapter 1). What space for resistance was there in the Mainstream Town discourse? This led on to a full scale genealogical analysis of the way the discourse of children and childhood could be seen to operate in Sri Lanka (in Colombo and Mainstream Town), which later became Chapters 3 and 4 of the thesis.

With the Colombo data I decided to experiment with a different, keyword, analysis of the text, to see what ideas were thrown up. I focussed on the more detailed cases at this point, and wrote a proto Specialist Court data chapter.

By this stage I felt that both the narrative and cut and paste keyword analyses were unmanageable. After a gap, during which I developed my ideas regarding globalisation, and wrote the theory based Chapter 2, I turned to the QSR NUD\*IST 4 (Nudist) software to assist in the data analysis.

I chose Nudist for several reasons. The programme had the merit of collecting disparate data together in one data base; the data was easily accessible, both as imported documents and as nodes on the index tree; it supported the display of data, as well as the development of ideas, relationships and themes associated with children and childhood in Sri Lanka. In addition Nudist permitted easy reproducibility, and secondary analysis, if necessary.

I had an initial period of experimentation with Nudist, during which I imported data in a “raw data” format. I decided to limit auto coding of data, because I felt this would involve too much prejudgment. I also found that the programme search operators tended to dictate the structure of the index tree as I coded data. For instance, to permit vector searches “parent” and “child” nodes are needed to intersect. Partly for this reason, I proposed to keep “ideas” nodes free floating, at the beginning at least. In the end I decided retain these nodes as free nodes, since I found it easy enough to display developing relationships through index searches (copies of which are retained on the data base). Overall I found the data display facility useful during analysis, but the end results of the analytical process were more difficult to display in the thesis, since they could only be shown as unwieldy chunks of text, or quantitative tables, or in association with other software.

After experimenting with the programme, I entered the data, reviewed cases and began the process of coding. I coded, for example, for the circumstances of a court case, the trigger event which had brought the child to court, and the application of section 34 of the CYPO (which deals with children in need of care or protection) to the child’s situation. At the same I coded for free floating “ideas” nodes such as children and education and children and work.

I reviewed all coding as I went along. For example, fairly early on I noted that I had coded very little data to the “child parent” free floating node, although the child parent relationship might have been thought to be a central issue in the court process, since

section 34 is intended to address parental irresponsibility. At the same time I had been coding all children over 14 years as legally eligible to work (whether in a house or a shop), and therefore also coded their cases as a mis- application of section 34. It then occurred to me that if allowing a child over 14 to work in a shop or in a house was treated as a failure of parental responsibility (whether this was legally accurate or not), then this would mean that the child parent relationship *was* central to the court process, and that section 34 was being interpreted (and extended) to accommodate this approach to parental responsibility. This was a key insight and I began to code for a “broad” and a “narrow” interpretation of section 34. The coding to the child parent node also increased.

Once I finished the coding process, and reviews, I carried out a long series of text searches testing a) the views expressed by participants, b) the relationships between ideas and c) the role of participants and ideas in constructing child placement. Simultaneously, sticking by my original preference for narrative, I developed a focussed narrative account, which, once the analysis was complete, became the basis of the subsequent data chapters.

## **Conclusion.**

The transition from an initial questioning of child rights claims to completed research has been governed by the rational perspective I have wanted to dispute. In setting out the reasons why I chose to use the QSR NUD\*IST 4 database above, I was again



struck by the way in which scientifically based criteria of validity continue to be significant in qualitative research. I would not claim, however, to have discovered the truth, or even a truth, about child rights and the lives of child servants. On the other hand, I would hope however, that my analysis has provided some insight into the limits of rights.

## **Appendix 2.**

### **Methodology.**

#### **Attachment A. Interview Transcript.**

\*Nandani: Interview with Nandani 6.10.96 at her home. Transcription begun 3.55 pm 6.10.96, from notes made at the time of the interview; translation by K. Words in square brackets inserted on transcription.

[did you know Mr and Mrs DS before you went?] [no.] [who made the arrangements for you to go?] ...brought by Ranjit. [is Ranjit a relative] [no, known to aunt.]

[why did you go?] [because did not want to go to school here.]

[who was at the DS house when you were there?] Mr and Mrs DS. [do they have any children?] yes the two daughters? and one son. [were any of them living there?] yes the two daughters.

(at this point the Aunt came into the room) [she did not stay long but went into the back, presumably to organise the tea which she later brought into the room. She was out of the room for much of Nandani's interview].

[what did you do at the house?] cooked, washed clothes, did practically everything in the house.

[I understand that Mrs DS is a retired domestic science teacher] The DS family said that Mrs DS would teach Nandani cookery [Nandani said] but she had not done so. I had watched her and learnt that way.

[what did you do when not cooking and cleaning?] [could relax?] unless the gentleman was sick then would be with the gentleman.

[did you ever get the chance to listen to the radio or watch television?] [did not] get chance to listen to the radio but if there was a television drama then could get permission to watch it.

[did you ever read books or play with the daughter?] never allowed to read or play with the daughter. [did you ever go into the daughter's bedroom?] would go into the bedroom with girl until she slept. [K then said that Nandani had said that] it was assumed that I might take books and read. [did you like the daughter?] No she would scold me, when gentleman called me would be beaten [and] he would call me at midnight if he was sick.

[where did you sleep?] in the daughter's bedroom. [did you have a bed?] no a reed mat and that was in tatters.

[did you go to school?] no [are you going to school now?] will be admitted in January. [is there any difficulty about admission, for example because you have been away?]

no.[are you going to do your GCEs?] yes. [what subjects do you like?] science.

[what will you do when you leave school] don't know, these people, ie the DS said would send abroad [unclear what capacity]. [K asked a question] sending me abroad had been promised when I was brought to their house.

[did you like it at the DS house] no. [why] harass me, the gentleman would beat me, when aunt came [on visit] conditions changed. [did you think of leaving?] no.

[did you get paid?] Instead of wages had been offered a gold chain [not given] the wrist watch that had been given was taken away [when she left] now they had paid 7000 rupees. [what do you think of that - supplemented by K] Those people said 7000 rupees too much. If [I] get an education and a job then a add money to that money and build a house for myself my fathers and sisters.

[what happened when the police lady came?] the first? visit was to do with land matter, [then she saw me in the kitchen and said that] there was a petition [and then she] investigated.

[were you glad that a petition was sent?] yes. [what happened when the police lady came back after the petition, because there must have been a second visit to do with the petition?] on the first visit itself she investigated. The gentleman refused to hand Nandani over saying that she had not been to a police station before. The police lady

insisted and I was taken to the police station. [what did you think of the police station?] OK. [were you taken to the court after the police station?] stayed in the police station 3 days. [where?] there is a hall and a matron and stayed there. [did the police explain to you why you were there?] yes, the police lady? explained that because they care about them that action [taken]. [were you then taken to court?] [yes] taken on a Monday. [did you understand what was happening at court?] no [did it upset or frighten you?] no

[then you were taken to B. Institution?] yes. [what did you think of B. Institution? the teachers there were very severe. They would punish, sometimes morning to evening the children were made to kneel on the ground and wait. [did you want to stay there?] no [did anybody at B. Institution explain why you were there?] no [did you get the chance to tell the magistrate what you wanted to happen?- at K's request changed question to, what decision you wanted the court to make?] no [what decision did you want the court to make?] [Nandani initially hesitated and squirmed a little, then said] send me back home.

[did you speak to the probation officer, Mr M?] yes. [did you get the chance to tell him what you wanted?] yes [I remember that somebody said, maybe the probation officer, that you wanted to go back to the DS family] did not say so, but remember that the gentleman said in court that I said so. [have you thought what job you would like to do?] no. [but you were happy to work in the house to begin with- question not understood by K] [would you work in a house again?] no. nandans.int

## **Appendix 2.**

### **Methodology.**

#### **Attachment B. Interview Transcript.**

\*Police: Interview with OIC Podi Nuwara 15.10.96. Transcription from notes taken at the time of the interview; part translation by K; transcription begun 3.15 pm 19.10.96. Words in square brackets inserted at time of transcription.

*... early part of interview omitted.*

[I said that I would like to ask about Nandani's case. After reminding her of the name of the householder she said yes, - road.] [I asked] how did you hear of the case? [OIC said] got telephone calls and entered message [I understood into a police book]. [The callers] never tell us who is speaking; [said] person harassing girl in the house, please remove the girl.

[OIC S said in English? that] she went to the place and made an inquiry. [N's] father and mother were not there; [householder] not legal guardian; N under 18, so took into custody and record statement. The girl said my mother (then OIC said that she could not remember and got the book of court reports, she said that she gave a copy to the court and kept a copy herself. She read the report through to herself) my mother lives with another person; she [N lives] with father and grandmother and younger brother or sister. But she has gone to school up to year 10. After that she was [waiting?] at

home, after school, during [after?] exam. Then her auntie, her father's sister said that she has a friend at -road you go there and study housework. After that the auntie had handed [N] over to the -road etc lady. From that day she was doing all things in the house, but had not been paid.

[OIC said in English?] after that [she] recorded the employers statement. She said that she has a friend- this girl's auntie. She [the auntie] ask her [tell her] that this girl has no mother, therefore we hope to send her to a foreign country, therefore we want to give her training in electrical items, therefore you give her that training. We did not take her as a servant.

[OIC said, in English] but the girl said that she never used the electrical items, only the heater and the rice cooker. The girl's father had not hand[ed] over the girl not? auntie. [N] worked there for 7 months. She is aged 17. After I give information to courts and produce girl to courts.

[OIC continued, in English] the girl slept in one room, only her. But in the middle of the night the husband aged 57, this person suffering from heart attack, he called the girl, ordered her to sit on the bed of the husband because of illness. (OIC then spoke in Sinhala, [translated as]) on investigation the man had asked [the girl] to come at midnight, she would sit on the bed, he would lean against her; nothing had happened- the lady was in the same room- he was afraid of a heart attack.

[OIC continued in English] the magistrate ordered [the householder to pay] 7000 rupees for 7 months as a servant, to be deposited in an account for the girl. This girl [would] like to go to her father.

I asked, is that what the girl said to you? (OIC gave a long explanation in Sinhala, [translated as]) the girl was asked by the magistrate where [would you like] to go children's home or to father. [N said] to father. Therefore on physical bail released to father, [father told?] should not give child to someone else.

I asked, did N understand [what was happening] in the police station? [OIC said in English] yes, I explained to the girl that you have a mother father, why working there? You are still a child- not at school. She said, only my father as guardian, therefore I [went/ want] to go to job. I explained that go to study, therefore [then] get a job, therefore at least go to garment [factory]. If you want to work as a servant after 18 years - you can go. Actually [N] like to stay here, did not like to stay in a home. She is innocent girl. Then [OIC continued in Sinhala translated as] Explained to the girl what her situation - asked what her feelings. Girl said no proper guardianship, no proper guidance. [illegible- N's?] father is there. Asked- said wants to go home.

[OIC continued in Sinhala that] the employers said that they [were] giving training, not according to the child. [The employers] told this to the court. [OIC said] that she was not so worried about who gave the phone call, only care if story is correct, then go an investigate and found girl; with the intention of helping girl and hoping that



some good would come. If she said that she couldn't go to her parents, we wouldn't give [her to] them; we would keep her in a children's home, and give training, training to do a job.

I asked at 17 would a girl of her class normally go to school? [I think translated by K as financial class] [OIC gave (a long explanation in Sinhala) translated as] if take the real condition of Sri Lanka [OIC] does not see [a] situation where a child [should not] be taken to school- education, uniform free [OIC interpolated in English - one uniform a year, it is enough]. [It is] a rare case [household] not enough money to buy books.

[OIC continued- in Sinhala] that recently the laws amended the age of majority, and they [children] cannot make their own decisions, interprets that law [as meaning] that the child is a junior, not mature enough.

[OIC continued in Sinhala that] in her own opinion a child under 18, other than being with parents/sibling must be adopted, otherwise not fit situation for the child.

*...rest of interview omitted.*

police3.int

## Abbreviations.

CRC:	United Nations Convention on the Rights of the Child 1989.
CYPO:	Children and Young Persons Ordinance No 48 1939 (Sri Lanka).
ICESCR:	United Nations Convention on Economic, Social and Cultural Rights 1966.
ILO:	International Labour Organisation.
IPEC:	International Programme on the Elimination of Child Labour.
JVP:	Janatha Vimukthi Peramuna.
LTTE:	Liberation Tigers of Tamil Eelam.
NGO:	Non Governmental Organisation.
OIC:	Officer in Charge.
SAARC:	South Asian Association for Regional Cooperation.
UNICEF:	United Nations Children's Fund.
WFC:	Worst Forms of Child Labour Convention, ILO No 182.

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